Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF HEALTH,

Petitioner,

v.

ALICE ONGOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Alice Ongom's registration to practice as a nursing assistant was suspended for twenty-four months after an administrative law judge found, by a preponderance of the evidence, that Ongom slapped, kicked, and threw a cup at an Alzheimers patient in her care.

Does the Due Process Clause of the Fourteenth Amendment require the state to apply the clear and convincing evidence standard of proof, instead of the preponderance of the evidence standard, to suspend or revoke a license to work as a health care provider?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the Washington State Department of Health, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 159 Wash. 2d 132, 148 P.3d 1029. App. 1. The opinion of the Washington Court of Appeals is reported at 124 Wash. App. 935, 104 P.3d 29. App. 40. The Findings Of Fact, Conclusions Of Law, Judgment And Order of the King County Superior Court is unpublished. App. 57. The Order Denying Respondent's Petition For Reconsideration and the Findings Of Fact, Conclusions Of Law, And Final Order of the Washington Department of Health are unpublished. App. 60, 70.

JURISDICTION

The judgment of the Washington Supreme Court was entered December 14, 2006. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Wash. Admin. Code 246-10-606 provides in part: "The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. . . . [T]he burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence." App. 185.

Other statutes relevant to this case are set out in the appendix. These include the laws governing the

licensing and regulation of nursing assistants, Wash. Rev. Code 18.88A (App. 84–94); the Uniform Disciplinary Act, Wash. Rev. Code 18.130 (App. 95–129); the Administrative Procedure Ac (App. 130–54), and the regulations governing adjudicative proceedings under that Act, Wash. Admin. Code 246-10 (App. 155–91).

STATEMENT

1. Regulation Of Nursing Assistants

Article XX, section 2 of the Washington Constitution provides: "The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines." App. 83. Consistent with this constitutional command, Washington has adopted comprehensive laws regulating health care practitioners, including nursing assistants.

a. Registration

The Department of Health (the Department) licenses nursing assistants. A nursing assistant is an individual "who, under the direction and supervision of a registered nurse or licensed practical nurse, assists in the delivery of nursing and nursing-related activities to patients in a health care facility." Wash. Rev. Code § 18.88A.020(4), App. 85. Nursing assistants are "the principal cadre of health care workers who provide for the basic needs of patients." Wash. Rev. Code § 18.88A.010, App. 84.

The law provides that the Department "shall issue a registration to any applicant who pays any applicable fees and submits [the required forms], provided there are no grounds for denial of registration or issuance of a conditional registration under this chapter or chapter 18.130 RCW." Wash. Rev. Code § 18.88A.080(1), App. 89.[1] The

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[1] Wash. Rev. Code 18.130 is the Uniform Disciplinary Act, which, *inter alia*, defines unprofessional conduct. An individual may be denied registration as a nursing assistant if he or she had committed an act of unprofessional conduct.

application fee for registration is fifteen dollars. Wash. Admin. Code 246-841-990(2), App. 190-91. No additional training is required to be a registered nursing assistant. However, a health care facility cannot assign a registered nursing assistant to provide care unless he or she "has demonstrated skills necessary to perform competently all assigned duties and responsibilities." Wash. Rev. Code § 18.88A.030(2), App. 86.

b. Disciplinary Procedures

The Department is also responsible for disciplining nursing assistants. Wash. Rev. Code § 18.88A.150, App. 92; Wash. Rev. Code § 18.130.040(1)(a)(xii), App. 99. A nursing assistant is subject to discipline for unprofessional conduct which includes, among other standards, "[a]buse of a client or patient . . . ." Wash. Rev. Code § 18.130.180(24), App. 126. A range of sanctions is available, but in selecting a sanction, the Department "must first consider what sanctions are necessary to protect or compensate the public." Wash. Rev. Code § 18.130.160, App. 114. Possible sanctions include censure, reprimand, suspension, or revocation of the license. Wash. Rev. Code § 18.130.160(1)–(2), (6), App. 113–14.

The procedures governing discipline are set out in the Uniform Disciplinary Act, Wash. Rev. Code 18.130 (App. 95). The Department can investigate a complaint or initiate its own investigation, if it has reason to believe a health care provider may have engaged in unprofessional conduct. Wash. Rev. Code § 18.130.080, App. 104–06. After an investigation, the Department will issue a statement of charges if there is reason to believe that a health care provider violated governing standards of professional conduct. At this point, the health care provider can request a hearing. Wash. Rev. Code § 18.130.090 (2004), App. 106. The hearing is governed by Washington's Administrative Procedure Act, Wash. Rev. Code 34.05. Wash. Rev. Code § 18.130.100 (2004), App. 110. In addition to the procedures in the

Administrative Procedure Act, the Washington legislature authorized the Department, in consultation with other agencies having disciplinary authority over health care professionals, to adopt uniform procedural rules. Wash. Rev. Code § 18.130.095(1)(a) (2004), App. 107–08; Wash. Admin. Code 246-10, App. 155–90.

The uniform procedural rules provide that a health care provider may be represented by counsel. Wash. Admin. Code 246-10-108(1)(a), App. 160. The rules require the complaint to state the "[f]actual basis for the action" and set out the "[s]tatutes and rules alleged to be at issue[.]" Wash. Admin. Code 246-10-201(1)(b)–(c), App. 166. The rules provide for interpreters for the hearing impaired or those who cannot readily speak or understand English, subpoenas to compel the attendance of witnesses, discovery, motions, and protective orders. Wash. Admin. Code 246-10-122, -123, -402, -403, -405, App. 161–63, 163–66, 172–78, 178–82, 182. At the conclusion of the hearing, the final order must contain findings of fact and conclusions of law. Wash. Admin. Code 246-10-702(1)(a); App. 187–88. A party may seek reconsideration of a final order, and decisions of the Department are subject to judicial review under the state Administrative Procedure Act (App. 130). Wash. Admin. Code 246-10-704, -706, App. 188–89, 189–90.

c. Standard Of Proof

The question presented in this case involves the standard of proof in an action to suspend or revoke a health care provider's license. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wash. 2d 812, 822, 108 P.3d 768 (2005). On the other hand, "[c]lear, cogent and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable." *In re the Dependency of K.S.C.*, 137 Wash. 2d 918, 925, 976 P.2d 113 (1999).

Pursuant to its statutory authority to adopt uniform procedural rules, the Department adopted a rule establishing the preponderance of the evidence as the standard of proof in disciplinary cases. Wash. Rev. Code § 18.130.095(1)(a) (2004), App. 107–10. Wash. Admin. Code 246-10-606 provides, in part:

> "*The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.* . . . [T]he burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, *the burden in all cases is a preponderance of the evidence.*" Wash. Admin. Code 246-10-606, App. 185–86 (emphasis added).

Preponderance of the evidence is the standard of proof applied by 35 states and the District of Columbia in medical disciplinary cases.[2]

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[2] Twelve states' courts and the District of Columbia have held that the application of the preponderance standard in medical disciplinary cases does not violate the Due Process Clause. *See* note 4 *infra* p. 24.

Nine states have specifically established the preponderance standard in medical disciplinary hearings by statute or administrative rule. *See* Del. Code Adm. tit. 24, 500-7.2.5; Haw. Rev. Stat. § 91-10(5); Ky. Rev. Stat. Ann. § 13B.090(7); 02-415-04 Me. Code R. § 1(A); Mass. Gen. Laws ch. 112, § 5 (board may impose discipline "upon proof satisfactory to a majority of the board"); Md. Code Ann., Health Occ. § 14-405(b), *amended by* 2004 Md. Sess. Laws, 1st Spec. Sess., ch. 5, § 1; Mont. Code Ann. § 37-1-311; Nev. Rev. Stat. 630.352(1); Tenn. Comp. R. & Regs. 1360-4-1.02(7).

Fourteen states require a preponderance of evidence by judicial decision. These cases do not involve a due process claim. *See Ethridge v. Arizona Bd. of Nursing*, 796 P.2d 899, 904 (Ariz. 1989); *Johnson v. Arkansas Bd. of Exam's in Psychology*, 808 S.W.2d 766, 769 (Ark. 1991); *Swiller v. Comm'r of Pub. Health & Addiction Servs.*, No. HHD CV 95-0705601, 1995 WL 611754 (Conn. Super. Ct. Oct. 5, 1995) (chiropractor); *Georgia Bd. of Dentistry v. Pence*, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996) (upheld preponderance standard against claim that

"reasonable doubt" should be used); *In re Med. License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998); *Bever v. Bd. of Reg. for the Healing Arts*, No. WD 57880, 2001 WL 68307, at *4 (Mo. Ct. App. Jan. 30, 2001), *cause ordered transferred to Mo. S. Ct.* (Mar. 27, 2001), *reh'g denied* (Mar. 27, 2001); *Foster v. Bd. of Dentistry*, 714 P.2d 580, 582 (N.M. 1986) (but clear and convincing used where fraud alleged); *In re Kincheloe*, 157 S.E.2d 833, 841 (N.C. 1967); *Shearer v. State Med. Bd.*, 97 N.E.2d 688, 691 (Ohio Ct. App. 1950), *but see* Ohio Rev. Code Ann. § 3719.121(A), (B) (West 2001) (clear and convincing standard for disciplinary action based on illegal drug use); *Starr v. State Bd. of Med.*, 720 A.2d 183, 191 (Pa. Cmwlth. Ct. 1998); *Miele v. Bd. of Med. Licensure & Discipline*, No. 90-1930, 1991 WL 789899, at *3 (R.I. Super. Oct. 9, 1991); *Goad v. Virginia Bd. of Med.*, 40 Va. App. 621, 634 n.10, 580 S.E.2d 494, 501 n.10 (2003). Two states use a preponderance of the evidence standard, but qualify it with the higher burden of proof: In an attorney general opinion, Kansas deemed its standard of proof to be "a preponderance of evidence that is clear and convincing in nature". *See* Kan. Atty. Gen. Op. No. 95-54 (1995). Utah requires a "clear preponderance" of evidence. *See Vance v. Fordham*, 671 P.2d 124, 128 (Utah 1983).

The remaining states apply the clear and convincing evidence standard of proof. Two states required the preponderance standard by statute or regulation until they were struck down on state constitutional grounds. *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996); *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000).

Two states require "clear and convincing evidence" in medical disciplinary hearings by statute. *See* Ala. Code § 34-24-90 (1975), *repealed by* Acts 1981, No. 81-218, p. 273, § 7, effective Apr. 7, 1981; Fla. Stat. Ann. § 458.331(3), *amended by* 2001 Fla. Sess. Law Serv. ch. 2001-277, §§ 21, 76 (West). *But see Rife v. Dep't of Prof'l Reg.*, 638 So. 2d 542, 543 (Fla. Dist. Ct. App. 1994) (court stated that higher standard not required to satisfy Due Process under United States Constitution).

Ten states that use "clear and convincing evidence" or its equivalent do so under the common law. *See Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), *but see In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence); *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis); *Cooper v. Bd. of Prof'l Discipline*, 4 P.3d 561, 568 (Idaho 2000); *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) ("clearly and conclusively"); *Allen v.*

2. The Proceeding To Suspend Ongom's Registration To Practice As A Nursing Assistant

Ongom was a registered nursing assistant employed by a retirement home, in the Alzheimers Dementia Unit. After receiving a complaint and conducting an investigation, the Department filed a statement of charges against Ongom, alleging that she had engaged in unprofessional conduct under Wash. Rev. Code 18.130.180(24) by abusing a client or patient. Ongom filed an answer denying the charges and requested a hearing.

The hearing was conducted by an administrative law judge. Ongom did not obtain representation. Three witnesses testified at the hearing: Ms. Bristlin, a care giver at the facility; Ms. Umagat, the program director in charge of the Alzheimers Dementia Unit, and Ongom. In addition, the administrative law judge considered a sworn statement submitted by Ms. Chmielewski, another caregiver.

Bristlin testified that one evening she entered the dining area in the Alzheimers Dementia Unit and saw Ongom pick up a coffee cup and throw it at Resident A, hitting her in the hand. Ongom then reached across the table, grabbed Resident A's hand and slapped it, telling Resident A, don't you ever throw anything at me again. Then Ongom walked over to Resident A and

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Louisiana Bd. of Dentistry, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989); *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999); *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (struck down preponderance of evidence standard on equal protection grounds); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to preponderance standard in administrative hearings for license revocations because of important interest involved); *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111, 121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license). Although a specific authority on point could not be found, it is presumed that the clear and convincing evidence standard is used in Indiana.

kicked her in the ankle three times. Bristlin testified that she took Resident A out of the dining room where Resident A complained that her hand and ankle hurt. Bristlin stated that Resident A could be combative. The next day Bristlin reported the incident to Umagat.

Umagat testified that Resident A had Alzheimers in the later stages. She further testified that Bristlin reported to her regarding the incident between Ongom and Resident A. Umagat testified that when she asked Ongom about the incident, Ongom denied it. When Umagat told Ongom there was a witness, Ongom stated that she had tripped over Resident A's foot. Other residents in the unit were unable to give statements. Umagat testified that she also spoke with Chmielewski, who told her that she did not observe the incident. Finally, Umagat testified that when she examined Resident A the day after the incident, she had a bruise and swelling from the bottom of the kneecap down to her ankle.

Ongom testified that Resident A threw a glass that hit her in the shoulder. Ongom was in the process of picking up the glass when she saw Resident A pick up a plate, preparing to throw it. Ongom testified that she left the glass on the floor and snatched the plate out of Resident A's hand, because Ongom was afraid that it would land on another resident in a wheel chair behind her. Ongom also presented a sworn statement by Chmielewski which stated that she saw Resident A throw a glass at Ongom, but she did not see Ongom touch or throw anything at Resident A.

The administrative law judge issued the Findings Of Fact, Conclusions Of Law And Final Order. App. 70–82. He stated that there was uncertainty about the applicable standard of proof in light of the decision of the Washington Supreme Court in *Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wash. 2d 516, 29 P.3d 689 (2001), *cert. denied*, *Washington State Medical Quality Assurance Commission*

v. Nguyen, 535 U.S. 904 (2002). In *Nyugen*, a divided court held that the Due Process Clause required clear and convincing evidence to revoke a license to practice medicine. However, in *Eidson v. Department of Licensing*, 108 Wash. App. 712, 32 P.3d 1039 (2001), Washington's intermediate appellate court held that *Nguyen* did not extend to all professional licenses. App. 78–79 ¶ 4.3. Given this uncertainty, the administrative law judge applied both standards and concluded that the Department "has proven by a preponderance of the evidence, but not by clear and convincing evidence, that [Ongom's] conduct violated RCW 18.130.180(24) (regarding abuse of a client)." App. 79 ¶ 4.5. The judge concluded that the Department did not prove its case by clear and convincing evidence because "there are conflicting witness statements whether [Ongom] touched Resident A or threw anything at Resident A." App. 80 ¶ 4.6. "Additionally, there was a period of time between the time the incident in question [sic], and when Resident A's injury was diagnosed or assessed." App. 80 ¶ 4.6. Ongom filed a petition for reconsideration that was denied. Order Denying Respondent's Petition For Reconsideration, App. 60.

3. Judicial Review

Ongom filed a petition for judicial review. The superior court affirmed the Department's final order. Findings Of Fact, Conclusions Of Law, Judgment And Order, App. 57–59. The court concluded that "[t]he findings of fact contained in the Department's final order are supported by substantial evidence." App. 58 ¶ 2.2. The court also concluded that "[Ongom] has not demonstrated that the Department erred in applying the preponderance of evidence standard of proof in a registered nursing assistant disciplinary case." App. 58 ¶ 2.3.

a. Court Of Appeals

Ongom appealed the superior court decision to the Washington Court of Appeals, which affirmed. The court distinguished *Nguyen*, concluding that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), applied differently to a nursing assistant registration than to a license to practice medicine. In *Mathews*, the Court held that "the specific dictates of due process generally requires consideration of three distinct factors . . . ." *Mathews*, 424 U.S. at 335. First, "the private interest that will be affected by the official action . . . ." *Id.* Second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ." *Id.* Third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

First, the court of appeals examined Ongom's private interest in her nursing assistant registration. The court concluded that the license was a "significant property interest" but it was not "equivalent to a medical license for purposes of due process analysis." App. 46 ¶ 14. The court contrasted "the rigorous education, training, and examination at enormous expense" to obtain a doctor's license with the fact that nursing assistants "have no educational or training requirements at all[.]" App. 46 ¶ 15. With regard to stigma, the court of appeals concluded that the loss of a nursing assistant license "does not approach the significant stigma attached to loss of the right to practice medicine." App. 49 ¶ 17. Thus, "[t]he license does not amount to a compelling property or liberty interest, nor does its loss carry with it a significant stigma." App. 50 ¶ 20.

Second, the court of appeals considered the risk of error. In contrast to the subjective nature of the claims against Dr. Nguyen, the court stated that the claims

against Ongom "are not at all subjective. She was accused of slapping, kicking, and throwing objects at a patient under her care." App. 52 ¶ 24. "The use of an objective standard lessens the need for a more stringent standard of proof." App. 52–53 ¶ 24.

Third, the court of appeals considered the government interest. The court held that the government "has a substantial interest in protecting the public from incompetent or abusive nursing assistants." App. 53–54 ¶ 27. The court concluded that "[a] preponderance of the evidence standard of proof makes it more likely that abusive or unscrupulous nursing assistants are properly disciplined." App. 54 ¶ 27.

After concluding that the preponderance of the evidence standard was proper, the court of appeals affirmed the Department's decision suspending Ongom's nursing assistant registration. App. 54–56 ¶¶ 29–32.

b. The Washington Supreme Court

Ongom petitioned the Washington Supreme Court for discretionary review. The court granted the petition and, in a 5:4 decision, reversed. The majority ruled that "this case is on all fours with *Nguyen*: The minimum constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence." App. 13 ¶ 23. In *Nguyen*, a divided Washington Supreme Court applied the three factors from *Mathews* and held that a preponderance of the evidence standard of proof in a proceeding to revoke a license to practice medicine violated the Due Process Clause.

As to the first *Mathews* factor, the private interest at stake, the majority in *Nguyen* ruled that Dr. Nguyen had a "profound" interest in his medical license. *Nguyen*, 144 Wash. 2d 527. The majority pointed to the "countless hours and probably tens (if not hundreds) of thousands of dollars" involved in obtaining a doctors license, and that loss of the license "diminishes the doctor's standing in both the medical and lay communities[.]" *Nguyen*, 144

Wash. 2d at 528. The *Nguyen* majority analogized this economic loss and stigma associated with license revocation to a "significant deprivation of liberty", similar to civil commitment in *Addington v. Texas*, 441 U.S. 418 (1979), or termination of parental rights in *Santosky v. Kramer*, 455 U.S. 745 (1982). *Nguyen*, 144 Wash. 2d 527.

Adhering to the reasoning in *Nguyen*, the majority in this case reached the same conclusions with regard to Ongom's interest in her nursing assistant registration. The majority below held that while "a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a lawful entitlement to practice one's chosen profession." App. 7–8 ¶ 14. The majority stated that it could not conclude that Ongom's "interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor." App. 8 ¶ 14. The majority also stated that "[t]here is no reason to believe that the damage to [Ongom's] professional reputation in the context of her life to be any less damaging than Dr. Nguyen's." App. 8–9 ¶ 15. Thus, in both cases, "professional discipline is stigmatizing. It is more than mere money and is thus entitled to a higher standard of proof." App. 9 ¶ 15.

As to the second *Mathews* factor, the risk of an erroneous result based on the challenged procedure, the majority below again relied on *Nguyen*. The majority in *Nguyen* reasoned that procedural safeguards cannot "substitute for . . . failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error." *Nguyen*, 144 Wash. 2d at 530 (internal quotation marks omitted). The majority below concluded that the risk of error was as great in this case as it was in *Nguyen*. App. 10 ¶ 18.

With regard to the third *Mathews* factor, the government's interest, the majority below followed

Nguyen and disagreed with the court of appeals that the government's interest involves anything more than the fiscal burden on the government that the additional process would impose. App. 11 ¶ 19. *Nguyen* held that the government's interest was limited to "the efficient and economic administration of its affairs." *Nguyen*, 144 Wash. 2d at 532. *Nguyen* concluded that this interest would not be damaged by a higher standard of proof because "[a]n increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se." *Id.*

The majority below ruled that "[Wash. Admin. Code] 246-10-606 is invalid because it requires only a preponderance." App. 13 ¶ 23. The court "reverse[ed] the Court of Appeals, [and] dismiss[ed] the statement of charges [against Ongom]." App. 13 ¶ 23.

Four justices dissented from the decision below, concluding that *Nguyen* was wrongly decided and should be reversed. Like the three dissenting justices in *Nguyen*, the dissent below reached a different conclusion with regard to each of the *Mathew's* factors. First, with regard to the private interest involved, the dissent below concluded that *Nguyen* misapplied *Addington*. According to the dissent, *Nguyen* relied on *Addington* for the proposition that "the clear and convincing standard of proof is constitutionally required whenever an interest at stake is 'more important than the interest against erroneous imposition of a mere money judgment.' *Nguyen*, 144 Wash. 2d at 525, 29 P.3d 689." App. 23 ¶ 34 (Owens, J., dissenting). However, the dissent concluded that "[t]he *Addington* Court simply recognized that some jurisdictions use the intermediate standard and that the intermediate standard is no stranger to the civil law." App. 23 ¶ 34 (Owens, J., dissenting) (internal quotation marks omitted). According to the dissent, "[t]his is a far cry from the bright-line rule that the *Nguyen* majority labeled a constitutional requirement." App. 23

¶ 34. According to the dissent, when the first *Mathews* factor is properly applied, a "registered nursing assistant has a private interest in his or her license, [but] this interest is less significant than those private interests that have justified application of an intermediate standard of proof in other cases." App. 28 ¶ 40.

Second, with regard to the risk of error, the dissent below concluded that the majority in *Nguyen* erred because it "relied on case-specific considerations [that] the agency acted as investigator, prosecutor, and decision maker and whether the charges brought against Dr. Nguyen were primarily objective or subjective." App. 21–22 ¶ 33 (Owens, J., dissenting) (internal quotation marks omitted). According to the dissent, *Santosky*, 455 U.S. at 757, stated that this Court "never has approved case-by-case determination of the proper *standard of proof* for a given proceeding." App. 21 ¶ 32 (Owens, J., dissenting). The dissent concluded that "[i]n the present case, Ms. Ongom received substantial procedural safeguards that minimized the risk of error." App. 28 ¶ 41 (Owens, J., dissenting).

Third, with regard to the government's interest, the dissent below concluded that *Nguyen* misapplied *Mathews* by limiting the government's interest to "practical and financial burdens . . . ." App. 19 ¶ 30 (Owens, J., dissenting). The dissent stated that this holding "is contrary to the language used in *Mathews*, in which the Court described the third factor as 'the Government's interest, *including* the function involved.' 424 U.S. at 335, 96 S. Ct. 893 (emphasis added)." App. 20 ¶ 30. To properly apply the third *Mathew's* factor the dissent stated that "we should consider the governmental interest in protecting the public against abuse by health care providers." App. 29 ¶ 42.

Based on this analysis, the dissent below concluded that "preponderance of the evidence is a constitutionally permissible standard of proof in

registered nursing assistant disciplinary proceedings." App. 32 ¶ 48. The dissent found that "Ongom failed to establish that the trial court's decision was not supported by substantial evidence." App. 31 ¶ 47. Thus, the dissent would have affirmed the Department's final order.

Justice Madsen concurred in the dissent below and authored a dissenting opinion of her own. She explained, "[a]lthough I signed the majority opinion in *Nguyen*, I agree with Justice Owens that *Nguyen* was wrongly decided on the law. And, its application in this case makes clear that it is also harmful and should be overruled." App. 33 ¶ 50 (Madsen, J., concurring in the dissent).

REASONS FOR GRANTING THE PETITION

The Washington Supreme Court held that the Due Process Clause requires the state to apply the clear and convincing standard of proof, instead of the preponderance of the evidence standard, to revoke or suspend the license of a nursing assistant. This decision conflicts with decisions of this Court, and this departure from precedent is so great that it is not simply a misapplication. The majority below disregarded the holdings of this Court. The decision below also conflicts with every state court decision considering whether the preponderance of the evidence standard of proof violates the Due Process Clause in health care disciplinary proceedings. By ignoring the decisions of this Court, the majority below has put patients in Washington and other states at greater risk of exposure to unfit health care providers.

1. The Majority Below Ignored This Court's Decisions Applying The *Mathews* Factors

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court held that to determine whether administrative procedures satisfy the Due Process Clause requires the consideration of three factors. The majority below ignored the holdings of this Court with regard to each of these factors.

a. The Majority Below Ignored Decisions Of This Court Holding That A Higher Standard Of Proof Is Required Only If The First *Mathews* Factor Involves Loss Of Liberty Or A Fundamental Right

The first *Mathews* factor is "the private interest that will be affected by the official action . . . ." *Mathews*, 424 U.S. at 335. The Washington Supreme Court concluded that a medical license and a registration to practice as a nursing assistant "each constitutes a lawful entitlement to practice one's chosen profession" and that "a professional disciplinary proceeding subjects [the licensee] to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor." App. 7 ¶ 14 (quoting *Nguyen*, 144 Wash. 2d at 521). The majority below held that, for these reasons, the private interest implicated in this case was so great that the Due Process Clause required clear and convincing evidence. According to the court below, "[i]t is more than mere money and is thus entitled to a higher standard of proof." App. 9 ¶ 15.

But this Court has required a higher standard of proof under the Due Process Clause only when the private interest involved was liberty or a fundamental right. When liberty or a fundamental right were not involved, this Court has sustained the use of the preponderance standard in the face of due process challenges. The loss of a nursing license involves neither liberty nor a fundamental right. Moreover, the Court has sustained the preponderance standard when avoiding stigma was part of the private interest.

In *In re Winship*, 397 U.S. 358 (1970), the Court held that a civil proceeding to have a child declared a juvenile delinquent required the beyond a reasonable doubt standard of proof. The private interest was exposure of the juvenile "to a complete loss of his personal liberty through a state-imposed confinement away from

his home, family, and friends [and] a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime." *Winship*, 397 U.S. at 374.

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that the Due Process Clause required civil commitment to a mental hospital to be proven by clear and convincing evidence instead of by a preponderance. The private interest was that "civil commitment for any purpose constitutes a significant deprivation of liberty . . . ." *Addington*, 441 U.S. at 425. The Court also explained that "involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual." *Id.* at 425–26.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held that the Due Process Clause requires clear and convincing evidence instead of a preponderance to terminate parental rights. The Court described the private interest as a fundamental right. According to the Court, a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky*, 455 U.S. at 758–759 (internal quotation marks omitted). Thus, "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759.

Winship, *Addington*, and *Santosky* thus required higher standards of proof when the private interest involved was liberty or a fundamental right. Ongom's interest in her nursing license does not rise to this level. The decision below ignored these precedents when it concluded that Ongom's private interest in her nursing registration required clear and convincing evidence.

The majority below also ignored the decisions of this Court holding that due process does not require clear and convincing evidence when the private interest does not involve liberty or a fundamental right. *Vance v. Terrazas*, 444 U.S. 252 (1980), upheld the preponderance standard in proceedings to establish the loss of United States citizenship. The Court was "unable to conclude that the [preponderance] evidentiary standard provided by Congress . . . is invalid under . . . the Due Process Clause of the Fifth Amendment." *Vance*, 444 U.S. at 266. According to the Court, "expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Id.* at 267. There can be no doubt that citizenship is a substantial private interest. Indeed, the Court has described United States citizenship as "the highest hope of civilized men." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). Yet, due process was satisfied by a preponderance standard.

In *Rivera v. Minnich*, 483 U.S. 574 (1987), the Court held that a state statute requiring a preponderance of the evidence to establish paternity did not violate the Due Process Clause. The Court distinguished the private interests in establishing paternity and terminating parental rights. According to the Court, the private interest at stake in paternity was economic—"avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child." *Rivera*, 483 U.S. at 580. And, as Justice Brennan pointed out in his dissent, there is "social stigma resulting from an adjudication of paternity . . . ." *Id.* at 585 (Brennan, J., dissenting). Nonetheless, the private interest in avoiding stigma did not compel a higher standard of proof.

The decision below that financial loss and stigma require clear and convincing evidence is also at odds with a decision in which the Court has established the standard of proof. "Where Congress has not prescribed

the appropriate standard of proof and the Constitution does not dictate a particular standard, [the Court] must prescribe one." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). In these circumstances, the Court has applied the preponderance standard to civil actions involving both financial loss and stigma. In *Huddleston*, the Court applied the preponderance standard to actions for fraudulent misrepresentation under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). In reaching its decision, the Court explained that "we have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake." *Huddleston*, 459 U.S. at 389. The Court cited *Santosky* (proceeding to terminate parental rights), *Addington* (involuntary commitment proceeding), and *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (deportation). *Huddleston* 459 U.S. at 389. On the other hand, the "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence." *Id.* at 389–90. The Court concluded that the "balance of interests in this case warrants use of the preponderance standard. On the one hand, the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct . . . ." *Id.* at 390. "On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover." *Id.*

Indeed, the Court has explained:

> "In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Helvering v. Mitchell*,

303 U.S. 391 (1938); *United States v. Regan*, 232 U.S. 37 (1914)." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985).[3]

Ongom paid a fee of fifteen dollars to obtain her nursing assistant registration. She was not required to have any special training or education. The proceeding to suspend her registration did not concern physical liberty or a fundamental right. Ongom's private interest in the loss of her nursing assistant license is certainly not greater than the loss of United States citizenship in *Vance* or the establishment of paternity in *Rivera*. Nor is it greater than a defendant's private interest in an action alleging securities fraud. Despite this fact, the majority below concluded that due process required clear and convincing evidence. This departure from precedent is so great that it does not represent a simple misapplication of this Court's decisions. Rather, the majority below has ignored the decisions of this Court.

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[3] *Sedima* involved the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968. Under RICO, a plaintiff can bring a private action to recover treble damages for acts that could be prosecuted as crimes. The financial loss and stigma involved in such actions are surely greater than Ongom's interest in her nursing assistant registration. However, the federal circuit courts of appeal have uniformly held that preponderance of the evidence is the appropriate standard of proof in RICO actions. *United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers*, 780 F.2d 267, 280 (3d Cir. 1985) ("[w]e are satisfied that the preponderance standard applies in civil RICO litigation. While we recognize that the defendants in such actions have significant interests at stake (i.e., financial, occupational, and reputational), these interests are not sufficiently compelling to trigger a more stringent burden of proof."); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303 (7th Cir. 1987) ("proof by a preponderance of the evidence is sufficient for a finding of liability under civil RICO."); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1296 (6th Cir. 1989) (same); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1320–21 (8th Cir. 1993) (same); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531–32 (9th cir. 1987) (same).

b. The Majority Below Failed To Consider Existing Procedural Safeguards As Required Under The Second *Mathews* Factor

The second *Mathews* factor is "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ." *Mathews*, 424 U.S. at 335. The majority below ignored Washington's procedural protections in evaluating the risk of erroneous deprivation of the private interest and the probable value of a higher standard of proof. App. 10 ¶ 18. The Uniform Disciplinary Act (App. 95), the Administrative Procedure Act (App. 130), and the regulations adopted by the Department of Heath (App. 155) provide substantial procedural safeguards including an administrative hearing, notice of the charges, the opportunity to be heard, the right to call witnesses, the right to be represented by counsel, and the right to judicial review. The Court below simply relies on *Nguyen*, which concluded that "none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error." *Nguyen*, 144 Wash. 2d at 530 (internal quotation marks omitted).

If this *Mathews* factor asked only whether the additional process sought might protect against erroneous deprivation of the private interest, then it always would favor greater procedural protection. But that is not the inquiry required under the second factor. Rather, the inquiry requires a *comparison* of *probable* outcomes, asking the *probable* value of the additional procedural protection in *light of existing procedural safeguards*. The majority below wholly failed to undertake this inquiry. Had it done so, and had it heeded the decisions of this Court discussed in Section 1.a., *supra* p. 16, majority

below would have concluded that the preponderance standard of proof chosen by Washington's policy-makers satisfies due process.

c. The Majority Below Ignored This Court's Decisions By Limiting The Third *Mathews* Factor To Fiscal And Administrative Burdens

The third *Mathews* factor is "the Government's interest, *including the function involved* and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335 (emphasis added). Relying only on its own decision in *Nguyen*, the majority below limits the third *Mathews* factor to the fiscal and administrative burden that a higher standard of proof would impose on the government. According to the majority below, the third prong of *Mathews* "does not relate to the interest which the government attempts to vindicate through the procedure itself." App. 11 ¶ 19. This conclusion ignores the state's strong interest in protecting patients from unfit health care providers and is plainly contrary to decisions of this Court.

In *Winship*, the Court considered the impact that requiring the beyond a reasonable doubt standard would have on the civil juvenile proceedings. The Court said: "Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process." *Winship*, 397 U.S. at 366. Similarly, in *Addington* the Court considered the state's "legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. To the same effect is *Santosky*, where the Court explained that

"[t]wo state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 U.S. at 766.

These decisions establish that the state's interest is not limited to fiscal and administrative concerns as the court below concluded. And this is not a situation in which the majority below simply misapplied the third factor. Rather, the court misstated and ignored the third factor set out in *Mathews*.

This fundamental departure from the Court's decisions is particularly egregious, as the additional process sought in this case—a higher standard of proof—directly bears on the state's ability to protect patients from unfit health care providers. In this respect, the decision below misunderstands the function of the standard of proof. "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. With the preponderance standard, the litigants "share the risk of error in roughly equal fashion". *Id.* For example, if the "standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent." *Winship*, 397 U.S. at 371 (Harlan, J., concurring). "Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *Winship*, 397 U.S. at 371 (Harlan, J., concurring).

The majority below did not assess the comparative social disutility of the two kinds of errors. Rather, the

court below chose the clear and convincing standard simply because under it fewer health care providers would be erroneously disciplined. But this ignores the state's vital interest in regulating the licensing of health care providers, and the consequence of a higher standard of proof for that interest. Under the higher standard dictated by the majority below, it is more likely that health care providers who have engaged in unprofessional conduct will not be disciplined—and patients will be put at greater risk of harm for that reason.

2. The Decision Below Conflicts With Every State Court Decision Considering Whether Application Of The Preponderance Standard In A Medical Disciplinary Proceeding Violates The Due Process Clause

It is also significant that the Washington Supreme Court stands alone. In our research, we have found no other decision holding that the preponderance standard violates the Due Process Clause in this context.[4] *Nguyen*

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[4] Colorado, Iowa, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Carolina, Texas, Vermont, Wisconsin, and the District of Columbia hold that the preponderance of the evidence standard does not violate the Due Process Clause in medical disciplinary proceedings. *See Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 502 (Colo. Ct. App. 2004) ("There is no constitutional requirement of a standard of proof beyond preponderance of the evidence in civil proceedings, *see Addington v. Texas*, 441 U.S. 418 (1979); and the General Assembly has determined that the standard of proof for all violations of the Podiatry Practice Act is the standard applicable in civil proceedings."); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) ("we hold that the preponderance of the evidence test adequately protected Dr. Sherman's Fifth Amendment property interest in his license"); *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991) ("A preponderance of the evidence is all that is required. This standard is sufficient to satisfy due process." (Citation omitted.)); *Rucker v. Michigan Bd. of Med.*, 138 Mich. App. 209, 211, 360 N.W.2d 154, 155 (1984) (Petitioner is wrong in claiming "that due process required that a more stringent standard of proof, the 'clear and convincing' standard, be applied in license revocation hearings."); *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456, 461 (1993) ("After

acknowledged this conflict. *Nguyen*, 144 Wash. 2d at 521 n.3 ("Some jurisdictions have asserted the mere preponderance standard is sufficient to satisfy due process[.]").

The *Nguyen* majority cited *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339, (Okla. 1996), and *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), as decisions holding that due process requires clear and convincing proof in analogous circumstances. *Nguyen*,

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weighing the [*Mathews*] factors set out above, we conclude that the application of the preponderance of the evidence burden of proof to psychologist disciplinary proceedings satisfies due process."); *In re the Revocation of the License of Polk*, 90 N.J. 550, 569, 449 A.2d 7, 16–17 (1982) ("we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment"); *In re Gould*, 103 A.D.2d 897, 897, 478 N.Y.S.2d 129, 129 (1984) ("we reject petitioner's claim that the standard of proof in a professional license revocation proceeding must be 'clear and convincing' proof to comport with due process requirements"); *North Dakota Bd. of Med. Exam'rs-Investigative Panel B v. Hsu*, 726 N.W.2d 216, 230 (N.D. 2007) ("Under the *Mathews* framework for analyzing due process claims, we conclude the preponderance of evidence standard satisfies due process."); *Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175, 185, 974 P.2d 814, 819 (1999) ("Balancing the three [*Mathews*] factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case."); *Anonymous (M-156-90) v. Bd. of Med. Exam'rs*, 329 S.C. 371, 378, 496 S.E.2d 17, 20 (1998) ("We find a preponderance of the evidence standard adequately protects a physician's property interest in his license."); *Granek v. Texas Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App. 2005) (the court rejects the contention "that due process requires clear and convincing evidence in medical disciplinary actions"); *In re Smith*, 169 Vt. 162, 172, 730 A.2d 605, 612 (1999) ("We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee."); *Gandhi v. Med. Examining Bd.*, 168 Wis. 2d 299, 303, 483 N.W.2d 295, 298 (1992) (the court rejected Gandhi's argument that "due process mandates proof of the allegations against a physician by at least clear and convincing evidence").

144 Wash. 2d at 521 n.3. However, while both of those decisions discussed the Due Process Clause, they were decided on state constitutional grounds. In *Johnson*, the court explained: "Because of the penal nature of disciplinary proceedings involving a professional license, the Oklahoma Constitution requires that the clear-and-convincing standard be applied in such disciplinary proceedings." *Johnson*, 913 P.2d at 1346. Similarly, in *Painter*, the court stated: "As a result, we hold [the preponderance standard] is also unconstitutional on due process grounds. This holding arguably gives Wyoming licensees greater due process protection than is required by the United States Constitution. This is permissible. Individual freedoms and protections are a priority in Wyoming." *Painter*, 998 P.2d at 941 (citation omitted).

Nguyen also relied upon *Silva v. Superior Court*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993); *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982); *Rife v. Department of Professional Regulation*, 638 So. 2d 542 (Fla. Dist. Ct. App. 1994); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *In re Zar*, 434 N.W.2d 598 (S.D. 1989); *Mississippi Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); and *Davis v. Wright*, 503 N.W.2d 814 (1993). *Nguyen*, 144 Wash. 2d at 522 n.3. However, none of these decisions involve the Due Process Clause. Rather, in the absence of a legislatively established standard of proof, these courts selected a standard of proof based on their views of appropriate public policy, not the Due Process Clause.

The fact that no other court has ruled that the preponderance standard violates the Due Process Clause in analogous circumstances further demonstrates that the majority below is not simply misapplying this Court's precedents—it is ignoring them.

3. The Decision Below Is Harmful To Patients In Washington And Other States

By requiring clear and convincing evidence, the decision below makes it more likely that providers who have engaged in unprofessional conduct will not be disciplined. This, in turn, increases the risk that patients will be exposed to unfit health care providers. And the decision to require a higher standard of proof is not just harmful to the citizens of Washington. In today's mobile society, health care professionals frequently move from state to state, sometimes for the purpose of avoiding the consequences of professional discipline. Indeed, in enacting the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, Congress recognized this problem, finding "a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C. § 11101(2).[5]

To protect against such health care providers, state statutes typically include authority to deny a health care provider license, or take disciplinary action against a regulated health care provider on the strength of discipline taken by another state or jurisdiction.[6] The

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[5] Among other things, the Act requires state boards responsible for licensing physicians to report disciplinary actions relating to the physician's professional conduct to the Secretary of Health and Human Services. The information is compiled in a national data bank and made available to state licensing boards and certain health care entities. 42 U.S.C. §§ 11132(a), 11137(a).

[6] For example, with respect to nurses, see Ark. Code Ann. § 17-87-309(7); Cal. Bus. & Prof. Code § 2761(a)(4); Colo. Rev. Stat. § 12-38-117(1)(d); Del. Code Ann. tit. 24, § 1922(a)(7); D.C. Code § 3-1205.14(a)(3); Fla. Stat. § 464.018(1)(b); Ga. Code Ann. § 43-26-40(a)(2); Haw. Rev. Stat. § 457-12(a)(8); Idaho Code Ann. § 54-1413(1)(i); 225 Ill. Comp. Stat. 65/10-45(b)(10); Ind. Code § 25-1-9-4(a)(7); Kan. Stat. Ann. § 65-1120(a)(8); Ky. Rev. Stat. Ann. § 314.091(1)(i); Md. Code Ann., Health Occ. § 8-6A-10(a)(3); Mich. Comp. Laws § 333.16221(b)(x); Minn. Stat. § 148.261, subd. 1(4); Miss.

Washington Supreme Court's decision undermines this authority. The many states that would have taken into account Washington's disciplinary action against regulated health care providers based on a preponderance standard in their licensing and discipline decisions, no longer will have that option.[7] Thus, by dictating a clear and convincing standard of proof in such proceedings, the Washington Supreme Court's decision not only frees Washington health care providers from discipline in Washington based on a preponderance standard, it also effectively immunizes them from discipline in the numerous states that have determined to rely on health care provider disciplinary actions of sister states to protect their citizens.

It is, of course, conceivable that such states could independently try to prove Washington-based unprofessional conduct by health care licensees such as Ongom. But the obstacles to that course, including the lack of means to discover Washington-based professional misconduct, as well as additional logistical and financial burdens, would be daunting.

The Washington Supreme Court's decision thus has removed from residents of other states—states to which Washington health care providers migrate—the greater protection that Washington's preponderance

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Code Ann. § 73-15-29(1)(d); Mo. Ann. Stat. § 335.066.2(8); Neb. Rev. Stat. § 71-147(9); Nev. Rev. Stat. § 632.320(12); N.H. Rev Stat. Ann. § 326-B:37.II.(f); N.M. Stat. § 61-3-28(A)(8); N.Y. Educ. Law § 6509(5)(b), (d); N.D. Cent. Code § 43-12.1-14(2); Ohio Rev. Code Ann. § 4723.28(B)(1); Okla. Stat. tit. 59, § 567.8(B)(10); Or. Rev. Stat. § 678.111(1)(h); 63 Pa. Cons. Stat. Ann. § 224(a)(6); S.C. Code Ann. § 40-33-110(A)(4); S.D. Codified Laws § 36-9-49(6); Tex. Occ. Code Ann. § 301.452(b)(8); Vt. Stat. Ann. tit. 26, § 1595(2); Va. Code Ann. § 54.1-3007(7); Wash. Rev. Code § 18.130.180(5); Wyo. Stat. Ann. § 33-21-146(a)(vi).

[7] In addition to physicians and nursing assistants, Washington regulates more than twenty health care professions under its Uniform Disciplinary Act. *See* Wash. Rev. Code § 18.130.040.

standard afforded to them. In this respect, the decision below not only ensures that Washingtonians—including its most vulnerable populations—will be exposed to a greater risk of unfit health care providers, it also ensures that they will have considerable nationwide company.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF HEALTH,

Petitioner,

v.

ALICE ONGOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

APPENDIX

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APPENDIX

Washington Supreme Court, En Banc

Alice ONGOM, Petitioner,

v.

STATE of Washington, DEPARTMENT OF HEALTH, OFFICE OF PROFESSIONAL STANDARDS, Respondent.

No. 76618-5.

Dec. 14, 2006.

Sanders, J.

¶1 By a mere preponderance of the evidence in an administrative hearing, Alice Ongom's nursing assistant's registration was suspended for alleged abuse of a patient. Ongom appealed to the Superior Court which affirmed, as did the Court of Appeals. *Ongom v. Dep't of Health*, 124 Wash. App. 935, 104 P.3d 29 (2005). We granted review and reverse, holding due process requires clear, cogent, and convincing proof.

FACTS

¶2 Fleeing Africa as a refugee, Alice Ongom escaped to the United States with her family making her new home in Washington. The State then registered her to practice as a nursing assistant in July 2000. By February 2001 Ms. Ongom was employed in that capacity at the Woodmark Retirement Home in Federal Way.

¶3 On the evening of February 22, 2001, an incident transpired between Ms. Ongom and an Alzheimer's resident. As a result the nursing

assistant program of the Department of Health issued a statement of charges against Ms. Ongom, alleging that she engaged in unprofessional conduct in violation of RCW 18.130.180(24). She was also criminally charged with fourth degree assault.[1]

¶4 Thereafter, on April 4, 2002, the Department conducted an administrative hearing to consider allegations of unprofessional conduct. Three witnesses testified: coworker Rebecca Bristlin; Woodmark program director Jocelyn Umagat, LPN; and respondent Ongom. The State was represented by the attorney general; however, Ms. Ongom, who speaks English only as her second language, represented herself pro se. Besides considering the testimony of these three witnesses, the health law judge also considered various documents including a prior written statement by Ms. Ongom and an affidavit of Franciska Chmielewski, another coworker who witnessed the incident. Chmielewski was unable to attend the hearing but generally supported Ms. Ongom's version of the events. As acknowledged by the hearing officer, the evidence was in serious conflict.

¶5 Bristlin claimed she observed respondent Ongom pick up a cup or dish from the floor and throw it at an Alzheimer's resident, slap the resident on the hands several times, and kick her on the left ankle or lower leg. However, Ms. Bristlin admitted she did not report the incident to management until the following day, contrary to a policy which required immediate reporting of such events.

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[1] The court ultimately dismissed the assault charge sua sponte.

¶6 Respondent Ongom testified that this particular resident had been aggressively violent toward her since the very first day of her employment and that she had frequently accosted her with racist remarks on various occasions, including the evening in question.[2] Nonetheless respondent testified that she held no ill will toward the resident as she understood the resident to be sick and not responsible for her actions. Respondent testified that the resident threw silverware and/or dishes at her that evening and that she (Ongom) suffered an injury to her shoulder as a result of being hit by a dish thrown by the resident. Ms. Ongom denied ever picking up the dish although she testified that she did take a plate from the resident to prevent further injury to herself or others, receiving no help from other caregivers in the room.

¶7 Ms. Chmielewski supported Ongom's version of the events, stating under oath that she saw the resident throw a glass, that she did not see Ms. Ongom throw anything at the resident, and that the resident "was well-known to staff for her aggressive behavior toward both staff and other residents. She sometimes kicked [ ] staff, and I have learned she assaulted another resident." Clerk's Papers (CP) at 173.

¶8 Finding that the program proved its case by no more than a mere preponderance, the hearing officer concluded the State had *not* proved its case by clear and convincing evidence. He found:

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[2] "You black bastard, why don't you leave me alone; all my properties have been stolen by black people." Clerk's Papers at 88 (Statement of Alice Ongom).

> The Presiding Officer concludes the Program did not prove its case by clear and convincing evidence. The Presiding Officer concludes this is so because there are conflicting witness statements whether the Respondent touched Resident A or threw anything at Resident A. Additionally, there was a period of time between the time the incident in question, and when Resident A's injury was diagnosed or assessed. Finally, the[re] was evidence to show that Resident A was combative and known to kick out on her own. While the evidence provided by the Program is of the type that "reasonably prudent persons are accustomed to rely upon in the conduct of their affairs," (see WAC 246-10-606), it is not of the type that is "highly probable" (see *State Farm Fire & Cas. Co. v. Huynh,* 92 Wash. App. 454, 962 P.2d 854 (1998)), following a review and consideration of all of the evidence in the record.

CP at 112 (Findings of Fact, Conclusions of Law and Final Order). Nevertheless, the presiding officer suspended Ongom's license because WAC 246-10-606 requires only proof by a preponderance of the evidence and WAC 246-10--602(3)(c) provides, "The presiding officer shall: ... (c) [n]ot declare any statute or rule invalid."

¶9 After concluding a preponderance of the evidence supported the charge of unprofessional conduct and further concluding the violation was

"moderate in nature," CP at 111, the presiding officer suspended Ms. Ongom's license for 24 months. The presiding officer also ordered her to complete the Healthcare Integrity and Protection Data Bank Reporting Form (section 1128E of the Social Security Act, 42 U.S.C. § 1320a-7e), *id.*, and promptly return the form to the Nursing Assistant Program, thereby establishing a permanent public record of the disciplinary measure.

¶10 The nursing home fired Ongom immediately after the incident in question. Ongom testified that "since that time I did go to school, I've been suffering without job, I can't get a job. I got one one [sic] place and I work for a day and then they stop me." CP at 242 (hearing transcript, docket no. 01-07-B-1031 NA (4/4/02)). "And the job I don't get, I came here as a refugee and I am being put this kind of thing, it really made me very, feel very bad." *Id.*

ANALYSIS

¶11 We review this administrative decision pursuant to the Administrative Procedure Act, chapter 34.05 RCW, and apply the "error of law" standard of RCW 34.05.570(3)(d) to the agency's legal conclusions. *Haley v. Med. Disciplinary Bd.*, 117 Wash. 2d 720, 728, 818 P.2d 1062 (1991).

¶12 We must determine whether proof by a preponderance of the evidence in a professional license disciplinary proceeding satisfies due process. For the reasons expressed in *Bang Nguyen v. Department of Health*, 144 Wash. 2d 516, 29 P.3d 689

(2001),[3] we conclude that due process requires clear and convincing proof. *Accord Miss. State Bd. of Nursing v. Wilson*, 624 So. 2d 485, 493 (Miss. 1993) ("The standard of proof required for a decision of the Board of Nursing in cases involving fraud or conduct deemed quasi-criminal in nature is clear and convincing evidence."); *Hogan v. Miss. Bd. of Nursing*, 457 So. 2d 931, 934 (Miss. 1984). Accordingly, we reverse and dismiss.

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[3] The dissent suggests we overrule *Nguyen* and adopt a preponderance of the evidence standard for all professional disciplinary proceedings. As a rule, we decide only issues properly raised by the parties in the petition for review or answer. *See* RAP 13.7(b) ("If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review...."); RAP 13.4(d) ("If the party wants to seek review of any issue which is not raised in the petition for review, that party must raise that new issue in an answer."). In the event we raise an issue sua sponte, we generally request additional briefing from the parties. RAP 12.1(b). *And see, e.g., State v. Aho*, 137 Wash. 2d 736, 741, 975 P.2d 512 (1999). The State failed to argue we overrule *Nguyen* in its answer to the petition for review, but first raised the issue in an unsolicited supplemental brief. This is a wholly adequate and sufficent ground to deny review. *See In re Custody of Brown*, 153 Wash. 2d 646, 651, 105 P.3d 991 (2005); *State v. Collins*, 121 Wash. 2d 168, 179, 847 P.2d 919 (1993); *Clam Shacks of Am., Inc. v. Skagit County*, 109 Wash. 2d 91, 98, 743 P.2d 265 (1987) (declining to review issue because raised only in supplemental brief). Furthermore, the issue "is precluded under RAP 2.5(a) as one raised for the first time on appeal" as the state "has not established its entitlement to an exception under the rule." *Hoflin v. Ocean Shores*, 121 Wash. 2d 113, 130-31, 847 P.2d 428 (1993) (footnote omitted). Because "the ends of justice" do not demand waiver or alteration of our rules of appellate procedure, RAP 1.2(c), reconsideration of *Nguyen* is inappropriate.

¶13 As stated, the identical issue was resolved in our recent *Nguyen* decision.[4] Dr. Nguyen was disciplined under the same statute (RCW 18.130.180) as was Ms. Ongom. As is always the case, there are certain factual and technical differences between the proceedings; however, we conclude the differences do not constitute a distinction justifying disparate treatment for Ms. Ongom under the generalized considerations set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[5]

¶14 We noted in *Nguyen* that "[a] professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor." *Nguyen*, 144 Wash. 2d at 521, 29 P.3d 689. Although undoubtedly a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a

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[4] The dissent does not argue *Nguyen* can be distinguished.

[5] More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural require-ment would entail.

Mathews, 424 U.S. at 334-35, 96 S. Ct. 893.

lawful entitlement to practice one's chosen profession. We cannot say Ms. Ongom's interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor. *See Nims v. Bd. of Prof'l Eng'rs & Land Surveyors*, 113 Wash. App. 499, 505, 53 P.3d 52 (2002) ("[T]he time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion."). We reject the Court of Appeals conclusion that "the property interest in a nursing assistant's license, while not insignificant, is considerably more limited than the property interest in a license to practice medicine." *Ongom*, 124 Wash. App. at 944, 104 P.3d 29. The licenses may be different, but nurses and medical doctors have an identical property interest in licenses that authorize them to practice their respective professions.

¶15 We also recognized Dr. Nguyen has a liberty interest in his license to preserve his professional reputation. *Nguyen*, 144 Wash. 2d at 527, 29 P.3d 689. So too does Ms. Ongom. True, Ms. Ongom's employment is probably much less financially rewarding than that of a medical doctor, but it is nevertheless all she has, and she is at least equally dependent upon her professional reputation for employment. Here a notice of her discipline for allegedly abusing a patient was posted in a national register by order of the hearing examiner, accessible by all the public as well as future prospective employers. There is no reason to believe that the damage to her professional reputation in the context of her life to be any less damaging than

Dr. Nguyen's. We therefore disagree with the comment of the Court of Appeals that "[a] nursing assistant who loses her license may suffer some slight damage to her reputation, but any such damage does not approach the significant stigma attached to loss of the right to practice medicine." *Ongom*, 124 Wash. App. at 944, 104 P.3d 29. To the contrary, loss of reputation to one marginally qualified for a modest occupation is potentially *more damaging* than the loss of reputation for a highly qualified medical specialist, such as Dr. Nguyen, who may have many more alternate career opportunities. In either case, professional discipline is stigmatizing. It is more than mere money and is thus entitled to a higher standard of proof.[6] *Nguyen*, 144 Wash. 2d at 524-25, 29 P.3d 689; *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

¶16 The Court of Appeals also attempted to distinguish *Nguyen* by claiming "Ongom's license was suspended for only 24 months, whereas Bang Nguyen's license was indefinitely revoked and he was prohibited from seeking from relicensure for five years." *Ongom*, 124 Wash. App. at 945-46, 104 P.3d 29. We do not believe, however, that the

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[6] The dissent cites *Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) for the proposition that "upholding the preponderance standard in a disciplinary proceeding against a stockbroker" sheds light on the constitutional burden of proof standard set forth in *Addington*. Dissent at ----. To the contrary, *Steadman* was decided on statutory grounds wherein "[p]etitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing-evidence standard." *Steadman*, 450 U.S. at 97 n.15, 101 S. Ct. 999.

constitutional standard of proof in a proceeding can be determined only after its outcome is known. "[T]he burden of persuasion should not vary according to the nature of the charges in the particular case." *Nims,* 113 Wash. App. at 505, 53 P.3d 52. For example in this proceeding the State had urged the presiding officer to suspend Ms. Ongom's license not for 2 years but 10. The burden of proof does not differ based on result of a particular proceeding or the nature of the charges.

¶17 Further, the Court of Appeals claims the risk of error in Nguyen's proceeding before a commission which applied a somewhat subjective criteria was greater than the risk of error in the instant proceeding conducted under the Administrative Procedure Act where "objective facts" are at issue. The Court of Appeals suggests, "[t]he use of an objective standard lessens the need for a more stringent standard of proof." *Ongom,* 124 Wash. App. at 947, 104 P.3d 29.

¶18 While there are certainly some differences in the facts and procedures at issue, we think the facts of this case, as found by the hearing officer, illustrate these differences do not justify a distinction in the eyes of the law and that the potential risk of error is not appreciably different. Here, the presiding officer explained his inability to determine the facts by clear and convincing evidence where two versions of diametrically opposed testimony were presented. Under the Administrative Procedure Act judicial review defers to the factual findings of the administrative hearing officer and, as was the case with Dr. Nguyen, provides no greater assurance against error.

¶19 Finally the Court of Appeals attempts to distinguish *Nguyen* based upon the nature of the governmental interest, claiming that the inquiry is not about the additional fiscal burden, if any, on the State to employ a higher burden of proof but rather the ultimate governmental interest which justifies the licensing scheme in the first place. We rejected a similar argument in *Nguyen:*

> The last factor called to our attention by *Mathews* is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews,* 424 U.S. at 335 [96 S. Ct. 893]. As one can quickly discern from a simple reading of the text, this requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed. As the Supreme Judicial Court of Massachusetts phrased it, the last factor examines "the government's interest in the efficient and economic administration of its affairs." *Thompson v. Commonwealth,* 386 Mass. 811, 438 N.E.2d 33, 37 (1982). This requirement does not relate to the interest which the government attempts to vindicate through the procedure itself.

Nguyen, 144 Wash. 2d at 532, 29 P.3d 689.

¶20 Unlike the court in *Mathews,* we cannot say the "additional cost in terms of money and administrative burden"[7] would be substantial were a higher burden of proof required. As we pointed out in *Nguyen, "[a]n* increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se." *Nguyen,* 144 Wash. 2d at 532, 29 P.3d 689. The same is true here.

¶21 Even if the interest to be considered was, as the Court of Appeals put it, that "interest in protecting the public from incompetent or abusive nursing assistants," *Ongom,* 124 Wash. App. at 948, 104 P.3d 29, we cannot see how that interest is any greater than the State's interest to protect the public from incompetent or abusive medical doctors-who are subject to discipline under the same statute-or, for that matter, the criminal law which requires proof beyond a reasonable doubt. As the Court of Appeals observed in *Nims,* it makes no sense to say that doctors who present the *"greater* risk [ ] should receive the benefits of a *higher* ... burden of persuasion" to prompt discipline than a lower-risk vocation. 113 Wash. App. at 505, 53 P.3d 52.

¶22 More fundamentally as we noted in *Nguyen,* the ultimate government interest is best furthered by medical disciplinary proceedings which reach an accurate and reliable result. *Cf. Addington v. Texas,* 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) ("Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least

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[7] *Mathews,* 424 U.S. at 347, 96 S. Ct. 893.

unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."); *Santosky v. Kramer,* 455 U.S. 745, 766-68, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (a standard of proof more strict than preponderance of the evidence is consistent with promoting the State's interest in a parental rights termination proceeding). Accuracy in disciplinary proceedings involving those registered to practice as nursing assistants is not less important than those involving medical doctors.

CONCLUSION

¶23 In sum, this case is on all fours with *Nguyen:* The minimum constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence. WAC 246-10-606 is invalid because it requires only a preponderance. Accordingly we reverse the Court of Appeals, dismiss the statement of charges, and direct that Ms. Ongom recover her statutory costs at trial and on appeal.[8]

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[8] We, however, deny Ms. Ongom's request for reasonable attorney fees under Washington's equal access to justice act, RCW 4.84.350(1), because we find the agency action was substantially justified in light of inconsistent decisions from the Court of Appeals: *compare Nims,* 113 Wash. App. 499, 53 P.3d 52 *with Eidson v. Department of Licensing,* 108 Wash. App. 712, 32 P.3d 1039 (2001).

Gerry L. Alexander, C.J., Tom Chambers, Charles W. Johnson, and James M. Johnson, JJ. (concurring).

¶24 Alexander, C.J. (concurring) While I recognize that courts in other jurisdictions might reach a different conclusion than that which we reach here, I am in accord with the majority's determination that this court's decision in *Bang Nguyen v. Department of Health,* 144 Wash. 2d 516, 29 P.3d 689 (2001), is controlling precedent in this state. Consequently, I agree that allegations of professional misconduct mandated under RCW 18.130.180 must be proved by clear and convincing evidence. I write separately only to express my disagreement with two aspects of Justice Madsen's concurrence in dissent.

¶25 First, I do not believe that it is appropriate for this court to reach an issue that was not asserted by the department of health, to wit: whether there is sufficient evidence on the record to satisfy the higher clear and convincing standard. *See* concurrence in dissent at ----. As Justice Madsen acknowledges, during the entire course of the proceedings herein, the department has maintained only that due process and the nature of the interests at stake here required no greater standard of proof than the preponderance of the evidence standard and that the evidence was sufficient to meet that burden. *Id.* Because the issue of whether the State proved its case by clear and convincing evidence was not raised, we should not address it.

¶26 Even if we were to address the issue, I disagree with Justice Madsen's conclusion that the

department of health proved by clear and convincing evidence that Alice Ongom abused one of her patients. *See* concurrence in dissent at ---- - ----. As the majority correctly observes, the hearing examiner determined, after considering all the evidence before him, that the department did *"not* prove[ ] its case by clear and convincing evidence." Majority at ----. In absence of substantial evidence to the contrary in this record and in light of the directly conflicting witness testimony about the events in question,[1] the appropriate course for this court to take is to defer to the hearing examiner's legal conclusion. We should not engage, as Justice Madsen does, in a reweighing of the evidence. *See, e.g., In re Disciplinary Proceeding Against Huddleston,* 137 Wash. 2d 560, 568, 974 P.2d 325 (1999) (a reviewing court gives deference to an administrative decision maker's conclusions and to the weight accorded to conflicting evidence, particularly when the credibility and veracity of witnesses are at issue).

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[1] To this end, there is substantial evidence on the record to support the presiding judge's determination that the department did not prove by clear and convincing evidence that Ongom's conduct violated RCW 18.130.180(24) (abuse of a client). The record shows that Ongom and Rebecca Bristlin provided directly conflicting testimony and that Ongom's, not Bristlin's, version of the event or events in question was supported by a third member of the staff, Franciska Chmielewski, who stated under oath that she did not see Ongom throw anything at the resident or otherwise touch her.

WE CONCUR: Richard B. Sanders, and James M. Johnson, JJ.

Owens, J. (dissenting).

¶27 The majority holds that the constitutionally required standard of proof in all medical disciplinary hearings is clear and convincing evidence. Majority at ----. The majority relies on *Bang Nguyen v. Department of Health,* 144 Wash. 2d 516, 29 P.3d 689 (2001), to invalidate WAC 246-10--606, the regulation establishing the preponderance of evidence standard of proof for professional disciplinary hearings under the Uniform Disciplinary Act, chapter 18.130 RCW. I dissent because *Nguyen* was wrongly decided. I would overrule *Nguyen* and hold that the constitutionally required standard of proof in registered nursing assistant disciplinary proceedings is preponderance of the evidence.[1] Accordingly,

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[1] The majority's reliance on RAP 13.7(b) amounts to judicial sleight of hand. With one hand, the majority cites *Nguyen* to support its decision while, with the other, it avoids revisiting *Nguyen* by asserting RAP 13.7(b). Majority at ---- n. 3. In this case we were asked to decide whether WAC 246-10--606 provides adequate procedural due process. Pet. for Review at 9. Since *Nguyen* appears to control this constitutional question, we must necessarily confront the issue of whether *Nguyen* was correctly decided. Accordingly, the State argued to overrule *Nguyen* in its supplemental brief and at oral argument. *See* Suppl. Br. of Resp't at 14; Wash. State Supreme Court oral argument, *Ongom v. State,* No. 76618-5 (Nov. 17, 2005), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. However, instead of considering the merits of the State's argument that *Nguyen* was wrongly decided, the majority's reliance on *Nguyen* strengthens a decision inconsistent with the due process holdings of this court and the United States Supreme Court. RAP 13.7 is not to be used as a shield to deflect substantive

because there is substantial evidence in the record supporting the superior court's determination that the State proved its case by a preponderance of the evidence, I would affirm the suspension of Alice Ongom's registered nursing license.

ANALYSIS

¶28 The State must provide "due process of law" whenever it deprives any person of "life, liberty, or property." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. Professional disciplinary proceedings must satisfy due process requirements. *Haley v. Med. Disciplinary Bd.*, 117 Wash. 2d 720, 732, 818 P.2d 1062 (1991) (citing *In re Revocation of License of Kindschi*, 52 Wash. 2d 8, 11-12, 319 P.2d 824 (1958)). The Washington Constitution provides no more procedural due process protections than does the United States Constitution. *See State v. Manussier*, 129 Wash. 2d 652, 679, 921 P.2d 473 (1996) (stating, "[t]he Gunwall[2] factors do not favor an independent inquiry under article I, section 3 of the state constitution"); *see also City of Bremerton v.*

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attention from a wrongly decided case. *See* RAP 1.2(a); *see also, e.g., In re Pers. Restraint of Carlstad*, 150 Wash. 2d 583, 597, 80 P.3d 587 (2003) (Sanders, J., dissenting) ("Together RAP 1.2(a), RAP 1.2(c), and RAP 18.8(a) make clear that an appellate court should liberally interpret the Rules of Appellate Procedure and alter any provision included therein when necessary to promote justice and to consider cases and issues on their merits."); *City of Tacoma v. William Rogers Co.*, 148 Wash. 2d 169, 182 n.7, 60 P.3d 79 (2002) (Sanders, J., dissenting) ("[T]here is no bar to this court considering issues not raised at trial when the interests of justice so dictate.") (citing RAP 1.2(c)).

[2] *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986).

Widell, 146 Wash. 2d 561, 579, 51 P.3d 733 (2002) (indicating the similarity between the state and federal provisions). Thus, " 'federal decisions regarding due process are afforded great weight.' " *Manussier,* 129 Wash. 2d at 680, 921 P.2d 473 (quoting *Rozner v. City of Bellevue,* 116 Wash. 2d 342, 351, 804 P.2d 24 (1991)). Such precedent requires this court to overrule *Nguyen.*

¶29 *The Nguyen Decision is Incorrect and Harmful.* Under the doctrine of stare decisis, this court will abandon a previously established rule only upon " 'a clear showing that [the] rule is incorrect and harmful.' " *Riehl v. Foodmaker, Inc.,* 152 Wash. 2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek,* 77 Wash. 2d 649, 653, 466 P.2d 508 (1970)). The majority relies on Nguyen to support its holding that the Constitution requires "clear and convincing" standard of proof in all professional disciplinary proceedings. Majority at ----. However, in *Nguyen,* through erroneous application of the balancing test articulated in *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976),[3] and through application of faulty logic, this

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[3] The "*Mathews* test" is as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

court inappropriately changed the emphasis of procedural due process protections. Specifically, in balancing the *Mathews* factors, the Nguyen majority erroneously overemphasized the importance of private interests and diluted the other *Mathews* factors. This error is harmful because it unnecessarily constrains the State's ability to protect the public from exposure to incompetent health care workers.

1. The *Nguyen* majority misapplied *Mathews*.

¶30 In *Mathews*, the Court pinpointed three factors used in "identif [ying] ... the specific dictates of due process." 424 U.S. at 335, 96 S. Ct. 893. The third factor of the *Mathews* test is "the Government's interest, *including the function involved* and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* (emphasis added) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)). The *Nguyen* majority held that this third factor only "relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure" and "does *not* relate to the interest which the government attempts to vindicate through the procedure itself." 144 Wash. 2d at 532, 29 P.3d 689 (emphasis added). In other words, the *Nguyen* majority limited the scope of the

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424 U.S. at 335, 96 S. Ct. 893 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)). The Court has used the *Mathews* test to determine the correct standard of proof in administrative hearings. *E.g., Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

third *Mathews* factor to administrative and pecuniary concerns. Such a limitation is contrary to the language used in *Mathews*, in which the Court described the third factor as "the Government's interest, *including* the function involved." 424 U.S. at 335, 96 S. Ct. 893 (emphasis added).

¶31 The *Nguyen* majority's limitation of the third factor of the *Mathews* test is also contrary to a vast body of precedent. Time and time again, both before and after *Nguyen*, this court, in applying the third *Mathews* factor, has considered broader governmental interests in addition to administrative and pecuniary burdens. *See, e.g., City of Bremerton v. Hawkins*, 155 Wash. 2d 107, 110, 117 P.3d 1132 (2005) (considering the governmental interest in protecting the public from drivers who fail to comply with state laws); *Born v. Thompson*, 154 Wash. 2d 749, 755-56, 117 P.3d 1098 (2005) (considering the governmental interests of "prosecuting misdemeanors" and "increasing public safety"); *In re Harris*, 98 Wash. 2d 276, 286-87, 654 P.2d 109 (1982) (considering the "State's interest in nonemergency detention of those who present a likelihood of danger to themselves or others"); *Ritter v. Bd. of Comm'rs*, 96 Wash. 2d 503, 511, 637 P.2d 940 (1981) (considering the public interest in "insuring competent, careful medical attention at all times").[4] As a

[4] This analysis is not unique to our state. The Ninth Circuit Court of Appeals also considers the substantive governmental interests when applying the *Mathews* test. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir.1998) (considering the government's interests in administering immigration laws and in preventing document fraud); *First Nat'l Bank & Trust v. Dep't of the Treasury*, 63 F.3d 894, 896 (9th Cir. 1995) (considering the government's interest in

result of this misapplication of the third *Mathews* factor, the *Nguyen* majority erroneously deemphasized the governmental interests at stake and unnecessarily tipped the *Mathews* scale in favor of the intermediate standard of proof in professional disciplinary cases.

2. The *Nguyen* decision conflicts with *Santosky*.

¶32 The *Nguyen* majority's analysis of the second *Mathews* factor is contrary to the Court's holding in *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The second *Mathews* factor requires us to consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S. Ct. 893. In *Santosky*, the Court stated that it "never has approved case-by-case determination of the proper *standard of proof* for a given proceeding." 455 U.S. at 757, 102 S. Ct. 1388. The Court further explained that "[s]tandards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.' " *Id.* (emphasis added) (alteration in original) (quoting *Mathews*, 424 U.S. at 344, 96 S. Ct. 893).

¶33 Nevertheless, in balancing the second *Mathews* factor, the *Nguyen* decision relied on case-specific considerations. Specifically, the *Nguyen*

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protecting bank depositors); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977) (considering the state's interest in removing vehicles from streets and highways).

majority considered whether the agency acted " 'as investigator, prosecutor, and decision maker' " and whether the charges brought against Dr. Nguyen were primarily objective or subjective. 144 Wash. 2d at 531, 29 P.3d 689 (quoting *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000)). Thus, the *Nguyen* majority did not properly follow the *Mathews* test, as delineated in *Santosky*, because it made case-specific considerations such as whether there was a right to a hearing by an unbiased tribunal or the right to judicial review.[5] The *Nguyen* majority weakened the public's ability to properly discipline all health care workers by extrapolating a sweeping legal rule from the peculiar facts of Dr. Nguyen's case. The State should not be disadvantaged in all future medical

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[5] As opposed to the fact-specific considerations proffered by the *Nguyen* majority, the dissent considered the following case-neutral factors in determining that there was a low risk of erroneous deprivation:

> (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against one; (6) the right to have the decision based only on the evidence presented; (7) [the right to] counsel; (8) the making of a record; (9) a statement of the reasons; (10) public attendance; (11) judicial review.

Nguyen, 144 Wash. 2d at 544-45, 29 P.3d 689 (Ireland, J., dissenting) (citing Henry J. Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1279-95 (1975)). Like Dr. Nguyen, Ms. Ongom received the benefit of all of the above factors.

disciplinary proceedings because of the specific facts and charges at issue in *Nguyen*.

3. The *Nguyen* decision conflicts with *Addington*.

¶34 The *Nguyen* majority relied on *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), to justify a bright-line rule that the clear and convincing standard of proof is constitutionally required whenever an interest at stake is "more important than the interest against erroneous imposition of a mere money judgment." *Nguyen*, 144 Wash. 2d at 525, 29 P.3d 689. However, in *Addington*, the Court held that the intermediate standard is required only "to protect particularly important individual interests in various civil cases" such as cases involving deportation and denaturalization. 441 U.S. at 424, 99 S. Ct. 1804. The *Addington* Court simply recognized that "some jurisdictions" use the intermediate standard and that the "intermediate standard ... 'is no stranger to the civil law.' " *Id.* (quoting *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)). This is a far cry from the bright-line rule that the *Nguyen* majority labeled a constitutional requirement.

¶35 Instead of adopting a bright-line rule, the *Addington* Court conducted a *Mathews* balancing test to determine whether the intermediate standard of proof was required for indefinite civil commitments. *Id.* at 425-27, 99 S. Ct. 1804. Subsequent United States Supreme Court decisions have upheld the preponderance standard in quasi-criminal disciplinary proceedings. *See Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 103-04, 101 S. Ct.

999, 67 L. Ed. 2d 69 (1981) (upholding the preponderance standard in a disciplinary proceeding against a stockbroker as constitutionally permissible); *Rivera v. Minnich*, 483 U.S. 574, 579-82, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987) (upholding the preponderance standard to determine paternity, " 'an interest far more precious than any property right' " (quoting *Santosky*, 455 U.S. at 758-59, 102 S. Ct. 1388)). These decisions make it clear that, contrary to our holding in *Nguyen*, the Constitution does not require courts to apply a heightened standard of proof in all cases involving more than a "mere money judgment."[6]

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[6] At issue in this case is the standard of proof necessary to provide the minimum required procedural due process protection. States are free to enact statutes requiring higher standards of proof. Nonetheless, at least 21 other jurisdictions have held that the preponderance standard is constitutionally appropriate and applies to interests greater than "mere money," such as those at stake in professional disciplinary proceedings. *See, e.g., Granek v. Tex. Bd. of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005); *Parrish v. Ky. Bd. of Med. Licensure*, 145 S.W.3d 401 (Ky. Ct. App. 2004); *Snyder v. Colo. Podiatry Bd.*, 100 P.3d 496 (Colo. Ct. App. 2004); *Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175, 974 P.2d 814 (1999); *In re Smith*, 169 Vt. 162, 730 A.2d 605 (1999); *Giffone v. De Buono*, 693 N.Y.S.2d 691, 263 A.D.2d 713, (1999); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998); *Ga. Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996); *In re Pet. of Grimm*, 138 N.H. 42, 635 A.2d 456 (1993); *Pickett v. Utah Dep't of Commerce*, 858 P.2d 187 (1993); *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299, 483 N.W.2d 295 (1992); *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366 (Iowa 1991); *Johnson v. Ark. Bd. of Exam'rs in Psychology*, 305 Ark. 451, 808 S.W.2d 766 (1991); *In re Disciplinary Action Against Wang*, 441 N.W.2d 488 (Minn. 1989); *Lyness v. State Bd. of Med.*, 127 Pa. Commw. 225, 561 A.2d 362 (1989), *rev'd on*

¶36 Ignoring this precedent, the *Nguyen* majority primarily relied on *Painter*, 998 P.2d 931, a Wyoming Supreme Court decision, to support its bright-line rule. In *Painter*, the Wyoming court held that "[d]ue process requires that the Board prove its disciplinary cases by clear and convincing evidence." *Id.* at 941. However, in so ruling, the *Painter* court noted that "[t]his holding arguably gives Wyoming licensees greater due process protection than is required by the United States Constitution." *Id.* Unlike the Wyoming Constitution, the Washington Constitution does not provide greater procedural due process protection than is required by the United States Constitution. *See, e.g., Manussier*, 129 Wash. 2d at 679, 921 P.2d 473. Thus, contrary to the *Nguyen* majority's analysis, *Painter* supports the conclusion that the preponderance standard is constitutionally sufficient in professional disciplinary proceedings in Washington. Accordingly, I would reject the bright-line rule adopted in *Nguyen*.

4. The *Nguyen* majority applied faulty logic.

¶37 The *Nguyen* majority stated the following:

> [S]ociety ... has the important dual interests that (1) Dr. Nguyen's standard of practice not fall below the acceptable minimum and (2) he not be erroneously

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other grounds, 529 Pa. 535, 605 A.2d 1204 (1992); *Foster v. Bd. of Dentistry*, 103 N.M. 776, 714 P.2d 580 (1986); *Rucker v. Mich. Bd. of Med.*, 138 Mich. App. 209, 360 N.W.2d 154 (1984); *In re Revocation of License of Polk*, 90 N.J. 550, 449 A.2d 7 (1982); *Ferguson v. Hamrick*, 388 So. 2d 981 (Ala. 1980); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C. 1979); In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

> deprived his license, as that would erroneously deprive the public access to and benefit from his services. Here *each* interest dictates a more exacting burden than mere preponderance.

144 Wash. 2d at 526, 29 P.3d 689. The *Nguyen* majority's contention that ensuring a minimum level of a physician's standard of care dictates a *higher* standard than the preponderance of evidence standard is nonsensical. Logic dictates that a heightened standard of proof will make it *more* difficult, not less difficult, for the State to properly discipline incompetent professionals. Apparently, the majority in the present case agrees with this point, as it eschews the *Nguyen* argument and instead chooses to cite the reasoning from *Nims v. Board of Registration for Professional Engineers & Land Surveyors,* 113 Wash. App. 499, 53 P.3d 52 (2002). Majority at ----. The majority, relying on *Nims,* admits the absurdity of the reasoning employed in *Nguyen,* stating, "it makes no sense to say that doctors who present the *'greater* risk [ ] should receive the benefits of a *higher* ... burden of persuasion' to prompt discipline than a lower-risk vocation." *Id.* (quoting *Nims,* 113 Wash. App. at 505, 53 P.3d 52). Thus, the majority affirms *Nguyen* while acknowledging that the logic used in that decision was faulty.

¶38 For the reasons stated above, the *Nguyen* decision is incorrect and harmful. Thus, *Nguyen* should be overruled.

¶39 *Procedural Due Process.* After overruling Nguyen, I would apply the Mathews test in order to

determine the constitutionally required standard of proof in registered nursing assistant disciplinary proceedings. After balancing the private interests at stake, the risk of erroneous deprivation, and the governmental interests and burdens, I would hold that the preponderance standard is constitutionally sufficient.

1. The Private Interest

¶40 An individual has constitutionally protected interests in his or her professional license and reputation. *See Haley,* 117 Wash. 2d at 732, 818 P.2d 1062. The *Mathews* test requires us to analyze the nature and extent of these interests. I agree with the majority that Ms. Ongom's registered nursing assistant's license represents her current vocational livelihood, majority at ----, but I also recognize the procedural and economic realities that limit the interest she has in such a license. In order to become a registered nursing assistant, one need only pay a nominal $15 fee and submit an application. WAC 246-841-990(2); RCW 18.88A.080(1). In contrast with *certified* nursing assistants, a *registered* nursing assistant need not obtain any education or training for registration. *See* RCW 18.88A.020(4), .085; WAC 246-841-490. Thus, Division One of the Court of Appeals correctly concluded that "[t]he purpose of the [registered] nursing assistant license ... appears to be solely to satisfy the need for a registry of those allowed to work in the field." *Ongom v. Dep't of Health,* 124 Wash. App. 935, 943, 104 P.3d 29 (2005). In contrast, "[a] physician completes many years of rigorous education, training, and examination at enormous expense." *Id.* at 942, 104 P.3d 29. Therefore, while a

registered nursing assistant has a private interest in his or her license, this interest is less significant than those private interests that have justified application of an intermediate standard of proof in other cases. *See, e.g., Addington,* 441 U.S. at 428-31, 99 S. Ct. 1804 (clear and convincing evidence required for involuntary civil commitments); *Santosky,* 455 U.S. at 758, 102 S. Ct. 1388 (clear and convincing evidence required for termination of parental rights); *Cruzan v. Mo. Dep't of Health,* 497 U.S. 261, 284, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (clear and convincing evidence required for termination of an incompetent patient's life-sustaining medical treatment). Accordingly, because the interests at stake in the present case are of lesser magnitude than the interests at issue in *Addington, Santosky,* or *Cruzan,* the first *Mathews* factor favors application of the lower standard of proof.

2. The Risk of Erroneous Deprivation

¶41 In addition, under *Mathews,* this court should consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S. Ct. 893; *see also Santosky,* 455 U.S. at 761, 102 S. Ct. 1388; *Nguyen,* 144 Wash. 2d at 544, 29 P.3d 689 (Ireland, J., dissenting). In the present case, Ms. Ongom received substantial procedural safeguards that minimized the risk of error. She was given notice of the action, a public hearing before an unbiased tribunal, the right to present evidence and make arguments, the right to know the government's evidence, the right to have the decision limited to the evidence, the opportunity to be represented by

counsel, a written record, a written statement of findings of fact and conclusions of law, and the right to judicial review. *Ongom*, 124 Wash. App. at 946, 104 P.3d 29 (citing ch. 18.130 RCW). Considering these procedural protections, I would hold that there is a relatively low risk of erroneous deprivation in this case. Thus, the second *Mathews* factor also weighs in favor of the preponderance standard.

3. The Governmental Interests and Burden

¶42 While a higher standard of proof would be unlikely to cause a large financial impact on the government, *see Santosky*, 455 U.S. at 767, 102 S. Ct. 1388, some additional cost is inevitable in order for the government to acquire and present sufficient evidence to satisfy the higher burden. Moreover, under the third *Mathews* factor, we should consider the governmental interest in protecting the public against abuse by health care providers. Specifically, the legislature has established a policy of "assur[ing] the public of the adequacy of professional competence and conduct in the healing arts." RCW 18.130.010; *see also* RCW 18.88A.010 (stating, "[t]he legislature declares that the registration of nursing assistants and providing for voluntary certification of those who wish to seek higher levels of qualification is in the interest of the public health, safety, and welfare"). The governmental interest in assuring competency of health care providers favors application of the preponderance standard.

¶43 In addition, the legislature has articulated a governmental interest in protecting vulnerable adults. *See, e.g.*, ch. 74.34 RCW (creating a reporting system for abuse, neglect, or abandonment of

vulnerable adults); ch. 9A.44 RCW (imposing heightened penalties for sex crimes against vulnerable adults); RCW 9.96A.060 (restoration of employment rights for felons does not include individuals employed by the department of social and health services if they have unsupervised access to vulnerable adults); RCW 18.20.125 (requiring inspections of boarding homes to protect vulnerable adults). This interest also favors application of the preponderance standard of proof.

¶44 Finally, the legislature has noted the existence of "the high and often critical turnover among the principal cadre of health care workers who provide for the basic needs of patients." RCW 18.88A.010. I acknowledge that the government has an interest in ensuring adequate access to health care providers and that this interest is furthered by a higher standard of proof. However, this interest is intertwined with the other governmental interests discussed above and should not be given independent consideration. The government's true interest is in protecting its citizens from incompetent health care providers. The interest in access to health care providers is undermined if the workers are incompetent. Thus, this court should not give much weight to an asserted governmental interest in ensuring access to potentially incompetent health care workers.

¶45 As demonstrated above, all three *Mathews* factors weigh in favor of the preponderance of the evidence standard of proof in registered nursing assistant disciplinary proceedings. Thus, I would uphold WAC 246-10-606, which establishes the

preponderance of the evidence standard of proof in such proceedings.

¶46 *Substantial Evidence.* In a factual challenge to a lower court ruling, this court should grant relief only if the lower court's determination is not supported by substantial evidence. RCW 34.05.570(3)(e). Evidence is substantial if "the record contains 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' " *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 588, 90 P.3d 659 (2004) (internal quotation marks omitted) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash. 2d 543, 553, 14 P.3d 133 (2000)).

¶47 Ms. Ongom failed to establish that the trial court's decision was not supported by substantial evidence. Ms. Ongom challenged the hearing testimony as "not credible" and argued that "it is just as probable that [she] is innocent of all wrongdoing." Pet. for Review at 11-12. This court is not well suited to make determinations of the credibility of witnesses. *Port of Seattle*, 151 Wash. 2d at 588, 90 P.3d 659. Therefore, I would affirm the suspension of Ms. Ongom's registered nursing assistance license as supported by substantial evidence.[7]

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[7] The majority states that one witness, Ms. Chmielewski, "supported Ongom's version of the events." Majority at ----. However, Ms. Chmielewski was not present at the hearing. In Ms. Chmielewski's affidavit, she declared without elaboration, "I did not see Alice [Ongom] touch or throw anything at [the resident]." Administrative Record (AR) at 173. Ms. Umagat testified that Ms. Chmielewski was in the dining

CONCLUSION

¶48 I would overrule *Nguyen*. The *Nguyen* majority erred by misapplying precedent, thereby skewing procedural due process protection in favor of private interests. The *Nguyen* majority's incorrect application of the *Mathews* test will harm the government's ability to protect the public from incompetent health care workers. Thus, instead of relying on *Nguyen* to determine the constitutionally required standard of proof in registered nursing assistant disciplinary proceedings, I would conduct an independent analysis using the *Mathews* balancing test. After examining this case through the *Mathews* lens, I would hold that preponderance of the evidence is a constitutionally permissible standard of proof in registered nursing assistant disciplinary proceedings. Accordingly, because there is substantial evidence in the record supporting the superior court's determination that the State proved its case by a preponderance of the evidence, I would affirm Ms. Ongom's suspension.

WE CONCUR: Mary E. Fairhurst, and Bobbe J. Bridge, JJ.

¶49 Madsen, J. (concurring in the dissent) As a result of this court's decision in *Bang Nguyen v. Department of Health*, 144 Wash. 2d 516, 29 P.3d 689 (2001), some of this state's most vulnerable citizens are now even more at risk for abuse. Alzheimer's

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room at the time of the incident but "told me she didn't actually observe the incident." AR at 220. If Ms. Chmielewski did not observe the incident, then her technically true statement that she did not "see" any touching or throwing neither supports nor contradicts Ms. Ongom's version of events.

patients like the victim in this case, along with the developmentally disabled, mentally ill, and the elderly depend for their care on people licensed under chapter 18.88A RCW. Many of these citizens lack the ability to speak out or be heard when they suffer abuse from caregivers. Instead of protecting these vulnerable citizens, the majority of the court tips the balance of protection in favor of the licensee and against these vulnerable citizens. As a result of applying *Nguyen* in this case, the abuse, which the hearing officer found was proved by a preponderance of the evidence, will go without redress.

¶50 Although I signed the majority opinion in *Nguyen,* I agree with Justice Owens that *Nguyen* was wrongly decided on the law. And, its application in this case makes clear that it is also harmful and should be overruled.

DISCUSSION

¶51 Addressing first the legal error in *Nguyen,* this court was incorrect in defining the nature of the interest involved in holding a professional license. In particular, we erroneously concluded that the pursuit of a profession involves a property right as well as a constitutional liberty interest akin to the liberty interests of the criminally accused. As early as 1909, in connection with attorney discipline, this court stated that

> [w]hile it is true that the practice of law is a lawful occupation in itself, it is not a natural right or a right guaranteed by the constitution. It is a privilege granted by the state, and may be surrounded with whatever restrictions

> the legislature may in reason prescribe[, e]ven to the extent of requiring any attorney, without compensation, to conduct the defense of destitute persons accused of crime.

State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 3, 101 P. 357 (1909) (citations omitted).

¶52 Since 1938, when the United States Supreme Court decided *United States v. Carolene Products Co.,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), courts have uniformly held that economic regulations such as professional licensing laws are subject only to rational basis review. Indeed, in *Steadman v. Securities & Exchange Commission,* 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981), the Supreme Court implicitly concluded that there was no fundamental constitutional liberty interest at stake in a proceeding to revoke a license to pursue a profession or occupation, and hence found no due process entitlement to a burden of proof greater than a fair preponderance.

¶53 Although we were determining the level of scrutiny to be applied in a due process challenge, a majority of this court recently pointed out in *Amunrud v. Board of Appeals,* 158 Wash. 2d 208, 143 P.3d 571 (2006), that neither this court nor the United States Supreme Court has characterized the right to pursue a particular profession as a fundamental right. Instead, courts have repeatedly held that the right to employment is a protected interest subject to rational basis review. By analogy, these decisions show that the preponderance

standard is appropriate here to protect the interests at stake.

¶54 As the United States Supreme Court recently explained:

> [T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, *but a right which is nevertheless subject to reasonable government regulation.*

Conn v. Gabbert, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (emphasis added). And the Supreme Court has made clear that "rational basis review" is the appropriate standard for reviewing such government licensing regulations. *Barry v. Barchi,* 443 U.S. 55, 61-62, 67-68, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (applying "rational basis" test in the equal protection and due process context to licenses for horse trainers). *See also Medeiros v. Vincent,* 431 F.3d 25, 29 n.3 (1st Cir. 2005) (it is "well settled" that there is no fundamental right to pursue a livelihood or occupation, and "legislation or regulation impinging upon such a right therefore is subject only to 'rational basis' review, rather than 'strict scrutiny' "); *Cornwell v. Cal. Bd. of Barbering & Cosmetology,* 962 F. Supp. 1260, 1271-72 (1997) (substantive due process challenges to regulations of occupations are "subjected to rational basis review," and "[t]he regulation may only be struck down if there is no rational connection between the challenged statute and a legitimate government objective"); *Mass. Bd. of*

Ret. v. Murgia, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (no fundamental right to government employment and applying rational basis review to restrictions on government employment); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (no fundamental right to practice law); *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (the right to work in a particular profession or trade is a protected right and subject to rational regulation); *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (applying rational basis review to requirements for acupuncture license); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wash. App. 145, 639 P.2d 853 (1982) (holding that the right to employment is not fundamental and applying rational basis review); *In re Revocation of License to Practice Med. & Surgery of Kindschi*, 52 Wash. 2d 8, 319 P.2d 824 (1958) (applying rational basis review to license revocation).

¶55 Other state courts have reached the same conclusion. *See, e.g., In re Revocation of License of Polk*, 90 N.J. 550, 562, 570, 449 A.2d 7 (1982) (interest in a professional license deserves protection, but not a fundamental right; such licenses are " 'always subject to reasonable regulation in the public interest' " (quoting B. *Jeselshon, Inc. v. Atlantic City*, 70 N.J. 238, 242, 358 A.2d 797 (1976))); *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456 (1993) ("[t]he right to work in one's occupation has never been placed on equal footing with fundamental personal rights," applying rational basis review to licensing regulation for medical doctors).

¶56 In light of these cases, including our recent decision in *Amunrud,* it is clear that *Nguyen* is wrong in describing the interest in a professional license as a liberty interest akin to the liberty interests of the criminally accused and wrong in requiring the clear, cogent, and convincing standard to protect that interest. Additionally, requiring a higher standard of proof than the preponderance standard is inconsistent with this court's recognition in *Amundrud* that under due process, a government licensing regulations need pass only rational basis scrutiny.

¶57 The *Nguyen* court also erred in determining what governmental interest is to be weighed in the balancing test of *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In *Nguyen* the court gave great weight to the economic factors involved in providing a predeprivation hearing but, though acknowledging the government interest in protecting the public, gave this more important interest insufficient weight. As the Wisconsin court persuasively points out, "the state is concerned with the direct and immediate threat to physical health, safety and welfare. The consequences of incompetent or unprofessional care or treatment may be highly injurious, and even fatal." *Gandhi v. State Med. Examining Bd.,* 168 Wis. 2d 299, 309, 483 N.W.2d 295 (1992) (conducting a *Mathews* balancing test and concluding that a physician's interest in his professional license is adequately protected under a preponderance standard). Here, as Justice Owens points out, the legislature has a strong interest in protecting vulnerable adults. Dissent at ----. This

case demonstrates why a preponderance standard is not sufficient to protect this interest.

¶58 Finally, although the department has not challenged the hearing officer's conclusion that the evidence presented did not meet the clear, cogent, and convincing standard, I believe the hearing officer is wrong on this point, based on his findings of fact. In written conclusions of law following the hearing, the examiner stated that the program did not prove the allegations by clear and convincing evidence because, he said,

> there are conflicting witness statements whether the Respondent touched Resident A or threw anything at Resident A. Additionally, there was a period of time between the time [sic] the incident in question, and when Resident A's injury was diagnosed or assessed. Finally, the [sic] was evidence to show that Resident A was combative and known to kick out on her own.

Clerk's Papers (CP) at 112 (Conclusion of Law 4.6).

¶59 The reasons given by the hearing officer for his conclusion are not supported by his findings of fact or by the record. First, although the hearing officer cited conflicting witness statements as a concern, he nevertheless found a violation, and this fact indicates that he resolved the credibility question against the respondent. His implicit resolution of the credibility issue is supported by the record and by his finding of fact showing that the respondent gave two conflicting versions of events, at one point denying kicking the resident and at

another point stating that she tripped over the resident's leg. CP at 109 (Finding of Fact (FOF) 3.8). Second, the hearing examiner is simply wrong in his assertion that a period of time elapsed before the resident was examined. Uncontroverted evidence establishes that witness Rebecca Bristlin took the resident for an immediate assessment and that the resident complained of pain in her ankle and wrist. Exs. 1, 3.

¶60 In addition to these flaws in conclusion of law 4.6, the hearing examiner made the erroneous finding that the injury to the resident's ankle "was not consistent with the type of repeated trauma described in the incident report." CP at 110 (FOF 3.12). This finding has no support in the record. Rather, the record demonstrates that the treatment providers who examined and treated the resident proceeded on the belief that the injury resulted from the resident being kicked and that the resident suffered bruising on her leg which worsened to an abscessed condition. It is also significant that the supervising nurse who investigated the incident and interviewed the witnesses reported the incident to the police.

¶61 The evidence here satisfies the preponderance of the evidence standard that should apply. Moreover, the evidence in the record also meets the clear and convincing standard that the majority says must be applied. Therefore, I would uphold the sanction imposed in this case under the majority's analysis as well.

Washington Court of Appeals

Alice ONGOM, Appellant,

v.

STATE of Washington, DEPARTMENT OF HEALTH, OFFICE OF PROFESSIONAL STANDARDS, Respondent

No. 52688-0-I

Jan. 3, 2005

¶1 Ellington, A.C.J. – In this case, a registered nursing assistant's license was suspended for abuse of a patient. We must decide what standard of proof is required in such disciplinary proceedings. We hold the preponderance of the evidence standard adequately protects the nursing assistant's due process rights. Because a preponderance of the evidence supports the findings, we affirm.

BACKGROUND

¶2 In 2001, Alice Ongom was licensed as a registered nursing assistant and was working as a caregiver at the Woodmark Retirement Home in Federal Way. Caregivers are responsible for assisting residents with their basic needs, including feeding, dressing, and hygiene.

¶3 On February 22, Ongom and two other caregivers were cleaning the dining room after dinner. Emma Usler, a resident in the later stages of Alzheimer's who was known to be combative, was in the dining room. The following day, one of the other caregivers, Rebecca Bristlin, reported to her supervisor that Ongom had abused Usler by slapping

her hands, kicking her leg, and throwing a coffee mug, which hit Usler's hands. Woodmark program director Jocelyn Umagat, L.P.N., interviewed Bristlin and other witnesses, and assessed Usler's injuries. Umagat reported the incident to police and to the Department of Health and Human Services. She then spoke to Ongom and terminated her employment. After a police investigation, Ongom was arrested and charged with fourth degree assault.[1]

¶4 The nursing assistant program of the Department of Health (the Program) initiated disciplinary proceedings against Ongom for abuse of a patient in violation of RCW 18.130.180(24).[2] After investigating, the Program issued a statement of charges, alleging that Ongom engaged in unprofessional conduct by slapping, kicking, and throwing a cup at a resident in her care.

¶5 Bristlin, Umagat and Ongom testified at a hearing before a health law judge. Ongom, who represented herself at the hearing, maintained she had not abused Usler. She testified that Usler was often aggressive, and that on this occasion Usler threw a glass at Ongom, hitting her, and shouted racial insults. Ongom testified she grabbed a plate from Usler to prevent her from throwing it, and left

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[1] The record shows that the court dismissed the charges on its own motion.

[2] RCW 18.130.180 provides, in part: "The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:.... (24) Abuse of a client or patient or sexual contact with a client or patient."

the room. Ongom presented an affidavit from the third witness to the incident, caregiver Franciska Chmielewski, who confirmed that Usler was frequently aggressive, and stated she saw Usler throw a glass at Ongom, but did not see Ongom touch or throw anything at Usler.

¶6 Health law judge John F. Kuntz observed that the correct standard of proof-a preponderance of the evidence, or clear and convincing evidence-appeared to be an unsettled question. He therefore considered the evidence under both standards, and concluded the Program had "proven by a preponderance of the evidence, but not by clear and convincing evidence, that [Ongom's] conduct violated RCW 18.130.180(24) (regarding abuse of a client). The Presiding Officer concludes this violation was moderate in nature."[3] Judge Kuntz ordered Ongom's license be suspended for 24 months.[4]

¶7 Ongom petitioned the superior court for judicial review. That court affirmed the use of the preponderance standard and upheld the decision to suspend Ongom's license. This appeal followed.

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[3] Clerk's Papers at 17.

[4] Ongom's license would have been restored in July, 2004. The discipline remains a matter of record, however, and the Department does not argue the matter is moot.

DISCUSSION

Due Process

¶8 Judicial review of a Department of Health administrative decision is governed by the Administrative Procedure Act.[5] This court applies the standards of the Act directly to the record before the agency.[6] In reviewing conclusions of law, we apply the "error of law" standard of RCW 34.05.570(3)(d), under which we give substantial weight to the agency's interpretation of the law, but are not bound by the agency's interpretation.[7]

¶9 A disciplinary proceeding like Ongom's requires the license holder to defend against charges of unprofessional conduct, and may result in license revocation. It must therefore comport with due process.[8]

¶10 In *Mathews v. Eldridge*,[9] the United States Supreme Court delineated three factors to be balanced in determining the minimum process required by the federal constitution: the private interest affected by the proceeding; the risk of error created by the State's chosen procedure; and the

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[5] Ch. 34.05 RCW.

[6] *Tapper v. State Employment Sec. Dep't.*, 122 Wash. 2d 397, 402, 858 P.2d 494 (1993).

[7] *Haley v. Medical Disciplinary Bd.*, 117 Wash. 2d 720, 728, 818 P.2d 1062 (1991).

[8] *See Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wash. 2d 466, 474, 663 P.2d 457 (1983).

[9] 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

countervailing government interest supporting the use of the challenged procedure.[10] In *Addington v. Texas*[11] and especially in *Santosky v. Kramer*,[12] the Court applied these factors to the question of the proper standard of proof.[13]

¶11 Ongom relies upon our Supreme Court's decision in *Nguyen v. State, Department of Health*,[14] and argues that the standard of proof required by due process in all professional disciplinary proceedings is clear and convincing evidence. In *Nguyen*, the Medical Quality Assurance Commission found, by a preponderance of the evidence, that Dr. Bang Nguyen committed unprofessional conduct. The Commission revoked the doctor's license to practice medicine, and prohibited him from seeking relicensure for five years. Our Supreme Court reversed. The *Nguyen* court framed the issue before it as follows: "At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license."[15] The court found that a physician's property and

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[10] *Id.* at 335, 96 S. Ct. 893.

[11] 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[12] 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[13] The Washington Supreme Court has observed that the *Mathews* factors "have some uneven relevance and application" to the burden of proof issue. *Nguyen v. State, Dep't of Health*, 144 Wash. 2d 516, 526, 29 P.3d 689 (2001) (citing *Santosky*, 455 U.S. at 747, 102 S. Ct. 1388).

[14] *Id.*

[15] 144 Wash. 2d at 522, 29 P.3d 689.

liberty interests in maintaining his or her license are compelling; that the risk of error was aggravated by the subjective nature of the charges and by the fact that the Commission acted as investigator, prosecutor, and decision maker; and that the government's interest in avoiding the additional burden associated with a more stringent evidentiary standard was minimal.[16] Applying the factors set forth in *Mathews* and *Addington* to these circumstances, the court held that due process required proof by clear and convincing evidence.

¶12 "The function of the standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[17] The *Nguyen* court did not address whether the standard of proof is the same when a different professional license (and therefore a different private interest) is involved. In *Eidson v. State, Department of Licensing*,[18] we held that the standard depends upon an analysis of the interests involved, and concluded the preponderance standard provided adequate due process protection in

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[16] 144 Wash. 2d at 527-33, 29 P.3d 689.

[17] *Addington*, 441 U.S. at 423, 99 S. Ct. 1804 (quoting *In re Winship*, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring)).

[18] 108 Wash. App. 712, 720-21, 32 P.3d 1039 (2001).

proceedings to revoke the license of a real estate appraiser.[19]

¶13 Here, we must decide what standard applies to revocation of the license of a registered nursing assistant. We address the *Mathews* factors in turn.

¶14 *Private Interest.* As *Nguyen* pointed out, "It is important to focus on the nature of the interest at stake in the sense that the more important the interest, the more process is required."[20] The license of a registered nursing assistant is a significant property interest, because it allows an individual to earn a living within a chosen field. It is not, however, equivalent to a medical license for purposes of due process analysis.

¶15 A physician completes many years of rigorous education, training, and examination at enormous expense, and generally expects the practice of medicine to be a permanent career. Registered nursing assistants, by contrast, have no educational or training requirements at all,[21] perform duties only as delegated and supervised by nurses,[22] and are employed in a field plagued by

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[19] We are aware that Division Two of this court has broadly interpreted *Nguyen* to apply to all professional disciplinary proceedings. *Nims v. Wa. Board of Registration,* 113 Wash. App. 499, 53 P.3d 52 (2002). We disagree with that court's position that this question merits no case-by-case analysis, such as the one we conducted in *Eidson.*

[20] 144 Wash. 2d at 525-26, 29 P.3d 689.

[21] RCW 18.88A.080.

[22] RCW 18.88A.020(4).

chronic and frequent turnover.[23] The legislature provided for a "voluntary certification of those who wish to seek higher levels of qualification" which requires some training and competency evaluation,[24] but even so, the value of the license to the holder is markedly different for nursing assistants than for physicians.

¶16 Additionally, the purpose of the license must be considered. By statute, any person can obtain a nursing assistant license by simply submitting an application and paying a nominal fee.[25] In fact, an applicant need not even obtain the license before beginning work as a nursing assistant.[26] The purpose of the nursing assistant

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[23] RCW 18.88A.010 (acknowledging "the high and often critical turnover among the principal cadre of health care workers who provide for the basic needs of patients").

[24] RCW 18.88A.010, .085. WAC 246-841-490 provides that approved training programs must cover certain core competencies, and must consist of no less than 85 hours of classroom and clinical training.

[25] RCW 18.88A.080 provides that "[t]he secretary [of health] shall issue a registration to any applicant who pays any applicable fees and submits, on forms provided by the secretary, the applicant's name, address, and other information as determined by the secretary." RCW 18.88A.085 provides that the secretary "shall issue a certificate to any applicant who demonstrates" he or she had satisfied the requirements of completion of an approved training program and competency evaluation. WAC 246-841-990 establishes a $15 application fee for registration and an equal fee for certification.

[26] RCW 18.88A.080(2) ("Applicants must file an application with the commission for registration within three days of employment.").

license, therefore, appears to be solely to satisfy the need for a registry of those allowed to work in the field. The purpose of the medical license, on the other hand, is to assure professional competence in a highly complex and potentially dangerous occupation, in which the practitioner is largely unsupervised, and poses a great risk to the public if incompetent.[27] To this end, the education and examination requirements are extensive.[28] Thus, the property interest in a nursing assistant's license, while not insignificant, is considerably more limited than the property interest in a license to practice medicine.

¶17 The *Nguyen* court also characterized the doctor's interest in his medical license as a liberty interest: "[T]his court has recognized a doctor has a liberty interest in preserving his professional reputation."[29] The distinctions we noted above in

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[27] RCW 18.71.002 ("It is the purpose of the medical quality assurance commission to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensing, consistent standards of practice, continuing competency mechanisms, and discipline.").

[28] RCW 18.71.050 establishes eligibility requirements for a license to practice medicine, which include proof the applicant has attended and graduated from an approved school of medicine and completed two years of post-graduate medical training, is of good moral character, and is physically and mentally capable of safely carrying on the practice of medicine. RCW 18.71.070 provides applicants must also successfully complete an examination covering subjects and topics, knowledge of which is generally required of a candidate for a degree of doctor medicine.

[29] 144 Wash. 2d at 527, 29 P.3d 689.

terms of the property interest apply in equal measure here. A nursing assistant who loses her license may suffer some slight damage to her reputation, but any such damage does not approach the significant stigma attached to loss of the right to practice medicine. The liberty interest here, if any, is nominal.

¶18 In *Addington*, the United States Supreme Court considered whether due process requires an elevated standard of proof in involuntary civil commitment proceedings, and held the proof must be greater than a preponderance but need not be beyond a reasonable doubt. In discussing the three evidentiary standards and the sorts of proceedings to which each applied, the Court observed that the intermediate clear and convincing standard of proof applies in civil cases involving "allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[30] The *Nguyen* court emphasized the quasi-criminal nature of medical disciplinary proceedings, in concluding that due process requires proof by clear and convincing evidence.[31] Ongom contends this analysis should apply in disciplinary proceedings against a nursing assistant.

¶19 But the phrase "quasi-criminal" can be logically applied to all license revocation procedures, because the license holder is called upon to defend against allegations made by the government with the aim of protecting the public, and the consequences are punitive in the sense that a privilege may be

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[30] *Addington*, 441 U.S. at 424, 99 S. Ct. 1804.

[31] 144 Wash. 2d at 529, 29 P.3d 689.

withdrawn. The quasi-criminal character of the proceedings must be taken into consideration in evaluating the private interest at stake, but it does not, standing alone, mandate application of a heightened standard of proof. As the *Nguyen* court noted, the United States Supreme Court has mandated the intermediate standard of proof only when the individual interests at state are "both particularly important and more substantial than money."[32] In other words, the clear and convincing standard provides the "level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual with 'a significant deprivation of liberty' or 'stigma'."[33] Thus, "[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss."[34]

¶20 As discussed above, a registered nursing assistant license is available for the asking, and requires no significant financial or educational investment. The license does not amount to a compelling property or liberty interest, nor does its loss carry with it a significant stigma. In addition, Ongom's license was suspended for only 24 months, whereas Bang Nguyen's license was indefinitely

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[32] *Santosky*, 455 U.S. at 756, 102 S. Ct. 1388; *see Nguyen*, 144 Wash. 2d at 529, 29 P.3d 689.

[33] *Santosky*, 455 U.S. at 756, 102 S. Ct. 1388.

[34] *Id.* at 758, 102 S. Ct. 1388.

revoked and he was prohibited from seeking relicensure for five years.

¶21 Ongom's interest in retaining her license is important. But the minimal effort required to obtain such a license, the limited work it authorizes the holder to perform, and the relatively minor (if any) stigma associated with its temporary suspension do not constitute a private interest that mandates an elevated standard of proof. We therefore proceed to the other *Mathews* factors.

¶22 *Risk of Error.* The procedural protections afforded to a nursing assistant in disciplinary proceedings are many. The Uniform Disciplinary Act (UDA)[35] requires that when a complaint is filed, it be evaluated to determine whether an investigation is warranted. If so, the investigator must inform the licensee in writing of the nature of the complaint, the licensee's right to consult with legal counsel prior to making a statement, and the fact that any statement may be used in an adjudicative proceeding under the UDA.[36] If the agency decides to act upon a complaint after investigation, the Administrative Procedure Act affords numerous procedural safeguards, including a public hearing before an unbiased tribunal, notice of the proposed action, the right to present evidence and argument and to know the government's evidence, the right to have a decision based only on the evidence presented, the opportunity to be represented by counsel, the making of a record, a

[35] Ch. 18.130 RCW.

[36] RCW 18.130.095(2)(a).

statement of the reasons for the decision, and the right to judicial review.[37]

¶23 Ongom does not contend she was deprived of any of these protections. Instead she relies on *Nguyen* for the proposition that these protections cannot substitute for the proper burden of proof.

¶24 The *Nguyen* court emphasized two factors in its risk of error analysis: the subjective nature of the charges against the physician, and the fact that the agency "'acts as investigator, prosecutor, and decision maker.'"[38] The court concluded that the subjective standard of conduct applied by the Commission, along with deferential judicial review, created an unacceptable risk of erroneous deprivation of constitutionally protected interests. Indeed, the court characterized the charges against the doctor, which included incompetence, negligence, malpractice, moral turpitude, dishonesty and corruption, as "almost entirely subjective in nature," and observed that a physician's standard of care is necessarily a matter of opinion.[39] The claims against Ongom, in contrast, are not at all subjective. She was accused of slapping, kicking, and throwing objects at a patient under her care. Whether or not such conduct violates the statute prohibiting abuse of a patient is hardly a subjective matter. The use of

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[37] RCW 18.130.100; RCW 34.05.446(3), .449, .461(4), .510-.598; WAC 246-10; *See also Nguyen*, 144 Wash. 2d at 545, 29 P.3d 689 (Ireland, J., dissenting).

[38] *Nguyen*, 144 Wash. 2d at 530-31, 29 P.3d 689 (quoting *Painter v. Abels*, 998 P.2d 931, 941-42 (Wyo. 2000)).

[39] *Id.* at 531, 29 P.3d 689.

an objective standard lessens the need for a more stringent standard of proof.[40]

¶25 In *Nguyen*, the Medical Quality Assurance Commission investigated and monitored the doctor's conduct, ordered him to be assessed by an educational program, preferred the charges against him, and ultimately sat in judgment of him. Although Nguyen and Ongom were disciplined under the same statutes, the procedures differed significantly. The proceedings against Nguyen were adjudicated by the Commission itself, "consisting largely of professional peers, rather than solely by administrative law judges or other judicial officers."[41] Ongom's case, however, was decided by an administrative law judge. Use of a professional judicial officer lessens the influence of the agency seeking discipline and tends to ensure independent and unbiased judgment.

¶26 The procedural protections afforded to nursing assistants minimize any risk of error, and support a preponderance standard of proof in disciplinary proceedings.

¶27 *Government Interest.* Ongom suggests the only government interest at issue is the additional fiscal burden on the State to employ a higher standard of proof. We disagree. It is clear that the government has a substantial interest in protecting the public from incompetent or abusive nursing

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[40] *See Eidson v. State, Dep't of Licensing*, 108 Wash. App. 712, 720, 32 P.3d 1039 (2001).

[41] *Nguyen*, 144 Wash. 2d at 545, 29 P.3d 689 (Ireland, J., dissenting).

assistants.[42] Regrettably, the minimal qualifications, poor compensation, arduous tasks, and high demand for nursing assistants encourages high turnover, which makes it easy for nursing assistants to escape discipline by moving from one job to the next. Additionally, nursing assistants, by definition, work with extremely vulnerable individuals who are unable to satisfy their own basic needs for daily living. Many will be unable to report abuse or testify in disciplinary proceedings. Indeed, the record here indicates that Usler could not remember how she had been injured shortly after it happened. A preponderance of the evidence standard of proof makes it more likely that abusive or unscrupulous nursing assistants are properly disciplined.

¶28 While an individual's interest in his or her license to practice as a nursing assistant is significant, it is outweighed by the public interest in protecting patients. We therefore hold that requiring the Program to prove its case by a preponderance of the evidence adequately protects both Ongom's interests and those of the public.

Substantial Evidence

¶29 An agency's findings of fact are reviewed under the substantial evidence standard of

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[42] *See, e.g., Barsky v. Board of Regents of University*, 347 U.S. 442, 449, 74 S. Ct. 650, 98 L. Ed. 829 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.").

RCW 34.05.570(3)(e). "Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'"[43] This standard requires us to "view 'the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.'"[44]

¶30 Ongom contends the Department's decision to suspend her license is not supported by substantial evidence. She points out that of the three witnesses to the incident (Bristlin, Chmielewki, [sic] and herself), only one (Bristlin) provided testimony supporting the charges. But Woodmark program director Jocelyn Umagat testified she found a half-dollar sized bruise and swelling on Usler's leg, which corroborated Bristlin's report.

¶31 In the end, the health law judge had to choose between the contradictory statements of Ongom and Bristlin. Ongom contends Bristlin's testimony was not credible. But the administrative law judge concluded otherwise, and it is not

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[43] *Heinmiller v. Dep't of Health*, 127 Wash. 2d 595, 607, 903 P.2d 433 (1995) (quoting *Nghiem v. State*, 73 Wash. App. 405, 412, 869 P.2d 1086 (1994)).

[44] *Freeburg v. City of Seattle*, 71 Wash. App. 367, 371-72, 859 P.2d 610 (1993) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash. App. 614, 619, 829 P.2d 217 (1992)).

for us to judge the credibility of witnesses or the weight to be given conflicting evidence.[45] Bristlin's statements were corroborated by her contemporaneous notes in the patient progress log and by Umagat's assessment of Usler's injuries; Ongom's testimony was undercut by inconsistent statements about the incident. The credibility and weight to be given this evidence was for the trial judge. We agree with the health law judge that the State produced substantial evidence to prove by a preponderance that Ongom abused a patient under her care.

¶32 We hold the proper standard of proof in nursing assistant disciplinary proceedings is a preponderance of the evidence, and that the evidence satisfied this standard here. We therefore affirm.

Coleman and Schindler, JJ., concur.

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[45] *Id.*

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ALICE ONGOM, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF HEALTH, OFFICE OF PROFESSIONAL STANDARDS, Respondents.	NO. 02-2-33179-3KNT FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER

THIS MATTER having come before the Honorable James Cayce of the King County Superior Court on June 17, 2003, on a petition under the Administrative Procedure Act, RCW 34.05, for judicial review of a final order of the Secretary of the Department of Health (Department), Docket No. 01-07-B-1031NA, dated July 2, 2002, and having considered the petition, heard the presentations of counsel, and considered the agency record and briefs filed herein, the Court issues the following:

I. FINDINGS OF FACT

1.1 Petitioner appealed the final administrative order of the Department of Health in which Petitioner's nursing assistant registration was suspended for a period of twenty-four months upon findings of unprofessional conduct by an administrative law judge under RCW 18.130.180.

1.2 Along with her appeal Petitioner filed two declarations and two exhibits containing facts outside the agency record on review.

1.3 The factual findings contained in the Department of Health's final order are incorporated herein by reference.

II. CONCLUSIONS OF LAW

2.1 The facts contained in Petitioner's two additional declarations and two additional exhibits are not admissible in a review under Chapter 34.05 RCW and therefore are not to be considered.

2.2 The findings of fact contained in the Department's final order are supported by substantial evidence.

2.3 Petitioner has not demonstrated that the Department erred in applying the preponderance of evidence standard of proof in a registered nursing assistant disciplinary case.

2.4 Petitioner's request for attorney fees is denied.

III. ORDER

IT IS THEREFORE ORDERED that:

3.1 Based on the above Findings of Fact and Conclusions of Law, the Department's final order is AFFIRMED.

DATED this *10* day of *July*, 2003.

//s//
JUDGE JAMES CAYCE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General

//s//
CHRISTOPHER G. SWANSON, WSBA #30507
Assistant Attorney General
Attorneys for State of Washington

Notice of presentation waived by:

//s//
CLAUDIA KILBREATH, WSBA #23144
DANIEL F. JOHNSON, WSBA #27848
Attorneys for Petitioner

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS

In the Matter of the Registration and/or Certification to Practice as a Nursing Assistant of: ALICE ONGOM, Registration No. NA00126143, Respondent.	Docket No. 01-07-B-1031NA ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Health Law Judge John F. Kuntz, Presiding Officer for the Department of Health, reviewed a Petition for Reconsideration filed by Alice Ongom (the Respondent). Christopher G. Swanson, Assistant Attorney General, represented the Nursing Assistant Program of the Department of Health (the Program). Having reviewed the Respondent's petition, the Program's response and the pleading on the record in this matter, the Presiding Officer now enters the following:

I. RELEVANT PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 11, 2001, the Program issued a Statement of Charges against Alice Ongom, the Respondent, alleging the Respondent engaged in unprofessional conduct in violation of RCW 18.130.180(24)([sic] abuse of a client or patient).

1.2 On December 3, 2001, the Adjudicative Clerk Office received the Respondent's Answer to

Statement of Charges. The Respondent requested an opportunity for settlement, and a hearing if the parties were unable to reach settlement.

1.3 On December 4, 2001, the Adjudicative Clerk Office served upon the parties a Scheduling Order/Notice of Hearing, scheduling a telephone prehearing conference date on March 8, 2002, and a hearing date on April 4, 2002.

1.4 On March 5, 2002, the Respondent filed a Request for Issuance of Subpoena with the Adjudicative Clerk Office. The Respondent requested the subpoena to compel her former employer, the Woodmark at Steel Lake, to produce specified documents, and compel the appearance of one witness, Franciska Chmielewski.

1.5 On March 8, 2002, the Presiding Officer convened the telephone prehearing conference with the parties. On March 28, 2002, the Presiding Officer issued an Order Defining Conduct of Hearing. **Prehearing Order No. 1**. Pursuant to the terms of the order, the Program would provide the Respondent with a copy of the Program's investigative file. The order also contained the stipulations and agreements entered into by the parties, and the orders and decisions of the Presiding Officer.

1.6 On March 15, 2002, the Adjudicative Clerk Office served upon the parties a Notice of Hearing, informing the parties of the date, time and location of the adjudicative proceeding in this matter.

1.7 On March 23, 2002, the Presiding Officer issued a Subpoena for Attendance at Administrative Hearing, addressed to Franciska Chmielewski, on behalf of the Respondent. The subpoena notified the Respondent that she was responsible for the service of the subpoena, and for any witness fees and expenses for the appearance of Ms. Chmielewski.

1.8 On April 4, 2002, the Presiding Officer commenced the adjudicative proceeding with the parties. On July 2, 2002, the Presiding Officer issued a Findings of Fact, Conclusions of Law and Final Order (the Final Order). In the Final Order, the Presiding Officer found the Respondent engaged in unprofessional conduct under RCW 18.130.180(24). The Presiding Officer concluded the Program proved its case by a preponderance of the evidence, the standard set for nursing assistant cases pursuant to WAC 246--10-606.

1.9 The order noted the conflicting decisions by the Washington Supreme Court in *Bang Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), cert. denied [sic] 535 U.S. __ (2002)([sic] No. 01-734, issued march 4, 2002) and by the Division One of the Court of Appeals in *Eidson v. Department of Licensing*, 108 Wn.App [sic] 712, 32 P.3d 109 (2001). For that reason, the Presiding Officer examined the evidence under both the preponderance of the evidence standard and clear and convincing standard, pending further legislative or judicial guidance in this issue. When reviewed under the clear and convincing standard of proof, the Presiding

Officer found the Program did not prove its case. Conclusions of Law 4.5-4.6.

1.10 Either party could petition for reconsideration of the order by filing the petition with the Adjudicative Clerk Office within 10 days of service, as set forth in RCW 34.05.461(3), RCW 34.05.470 and WAC 246-10-704. The Adjudicative Clerk Office served upon the parties, by mail, a true and correct copy of the Final Order on July 3, 2002.

1.11 On July 15, 2002, the Respondent filed her Petition for Reconsideration with the Adjudicative Clerk Office. The Respondent requested the decision be reconsidered and reversed because:

A. There were three witnesses to the alleged event, and two of them, the Respondent and Franciska Chmielewski, say that Respondent did not commit the acts alleged or harm the Resident in question.

B. Ms. Chmielewski did not attend the hearing despite the subpoena. The Respondent was not able to compel Ms. Chmielewski's presence because she had to go to work for the charging party on the day of the hearing.

C. The testimony against the Respondent is that she kicked Resident four times. The bruises allegedly found on the victim are not consistent with such extreme abuse.

D. The testimony is that the Respondent slapped Resident several times. There was no evidence of any such abuse.

E. The standard of proof should be clear and convincing evidence, which the Program did not meet.

1.12 On august 19, 2002, the Presiding Officer issued an Order Specifying Date of Action on Petition for Reconsideration. **Posthearing Order No. 1.** The order indicated the Program could file a response within 30 days of the order date (September 18, 2002), and the Presiding Officer would issue a written disposition of the Respondent's petition within 60 days of the order (October 18, 2002).

1.13 On September 18, 2002, the Program filed a Response to Respondent's Petition for Reconsideration with the Adjudicative Clerk Office. In its response the Program addressed what it characterized as the Respondent's errors of law and errors of fact:

A. The Program characterized the Respondent's grounds for reconsideration A, C, and D as errors of fact. The Program contended it presented evidence to support the alleged abuse (Finding of Fact 3.3; Exhibits D-1 though [sic] D-7). The Program further contended it presented evidence of the connection between the abuse and the injuries sustained by Resident A (Finding of Fact 3.7; Exhibits D-1 through D-7). The Program contends the Presiding Officer weighed all of the facts and testimony and concluded it had proven its case by a preponderance of the evidence.

B. The Program characterized the Respondent's grounds for reconsideration B and E as errors of law. The Program contended the Presiding Officer provided the Respondent with a subpoena to compel Ms. Chmielewski's attendance at the adjudicative proceeding. The Program stated it was unclear whether the Respondent served the subpoena on Ms. Chmielewski. The Program contended it did not prevent the Respondent from securing the witness's attendance, and therefore no error of law in this circumstance.

C. With respect to issue E, the Program contended the Respondent did not cite any legal or other authority for her proposition that the higher evidentiary standard (clear and convincing evidence) should apply. The Program noted that there is legal uncertainly about how the standard should apply to different professional licenses. In addition to the case decisions in *Bang Nguyen* and *Eidson*, the Program cited a recent decision of Division Two of the Court of Appeals, *Nims v. Washington Board of Registration*, __ Wn.App. [sic] __, (Docket No. 27431-1-II, August 30, 2002). In *Nims*, the court concluded that the clear and convincing standard of proof applied to registered professional engineers. The Program contends there is no case law extending the clear and convincing standard to nursing assistant licenses.

1.14 Following its analysis, the Program argued the appropriate legal standard for nursing assistants in the state of Washington continued to be a preponderance of the evidence, and argued the Respondent's petition for reconsideration should be denied.

1.15 On September 30, 2002, the Respondent filed her Affidavit in Support for Reconsideration with the Adjudicative Clerk Office. The Respondent contended she delivered the subpoena to Ms. Chmielewski, and was informed by Ms. Chmielewski that she would be unable to attend the hearing due to her work schedule at Woodmark at Steel Lake (the Respondent's former employer). The Respondent asserted she was advised by staff with the Adjudicative Clerk Office to bring the witness's telephone number with her to the hearing. The Respondent further contended that she was informed the witness's testimony was not necessary.

II. CONCLUSIONS OF LAW

2.1 When an adjudicative proceeding is conducted by a Presiding Officer authorized to make the final decision, the Presiding Officer must issue a final order containing findings of fact and conclusions of law. WAC 246-10-605. The order must be based upon the kind of evidence upon which reasonably prudent persons are accustomed to rely upon in the conduct of their affairs. WAC 246-10--606. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence. WAC 246-110-606.

2.2 The Presiding Officer shall:

(a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;

(b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning

available, including that found in federal and Washington constitutions, statutes, rules and court decisions; and

(c) Not declare any statute or rule invalid.

WAC 246-10-602(3). If the validity of any statute or rule is raised as an issue, the Presiding Officer may permit arguments to be made on the record concerning the issue for purposes of subsequent review. WAC 246-10-602(4).

2.3 The Respondent filed a timely petition for reconsideration.

2.4 Pursuant to WAC 246-10-602(3), the Presiding Officer cannot declare WAC 246-10-606 to be invalid. In other words, until such time as WAC 246-10-606 is changed or declared invalid[1], the Presiding Officer will apply the preponderance of the evidence standard to nursing assistant cases.

2.5 Given the legal uncertainty regarding the standard of proof in disciplinary proceedings involving the nursing assistant profession, the Presiding Officer created a record for further review pursuant to WAC 246-10-602(4).

2.6 In her petition for reconsideration, the Respondent did not raise any issues pursuant to WAC 246-10-704(2)(b) or (c). The Respondent's petition for reconsideration will be granted, if at all, pursuant to WAC 246-10-704(2)(a).

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[1] The *Nguyen*, *Eidson* and *Nims* decisions do not change or declare WAC 246-10-606 invalid. Similarly, they do not clearly replace the preponderance of the evidence standard with a clear and convincing standard for nursing assistants.

2.7 The Respondent has not established a basis for relief.

2.7.1 While the Respondent may disagree with the conclusions reached by the Presiding Officer regarding the evidence, she does not make any specific showing of a factual error regarding the decision as required by WAC 246-10-704(4). Additionally, the Program was required under RCW 18.130.180 to show abuse of a client, not extreme abuse as specified in the Respondent's petition.

2.7.2 The Respondent alleges that Ms. Chmielewski failed to appear in response to the subpoena. The Respondent has not shown that she made a request to the Presiding Officer for an order to enforce the subpoena, nor does she make any specific reference to the hearing record to show that she requested the Presiding Officer make telephone contact with the Respondent. In fact, she did not raise this contention until filing her affidavit in support of her petition, which was filed *after* the Program filed its responsive pleading.

2.7.3 The standard of proof in nursing assistant cases continues to be preponderance of the evidence. Although the Program did not prove its case by clear and convincing evidence, absent legislative or judicial action on the issue of the standard of proof, the Presiding Officer concludes he cannot change the applicable standard. The Respondent's issue, however, is preserved for appeal.

III. ORDER

Based on the foregoing Relevant Procedural History and Findings of Fact, and Conclusions of Law, the Presiding Officer DENIES the Respondent' s Petition for Reconsideration.

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V., Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.470(3) and RCW 34.05.542.

DATED THIS *18th* DAY OF OCTOBER, 2002.

//s//

JOHN F. KUNTZ, Health Law Judge
Presiding Officer

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS

In the Matter of the Registration and/or Certification to Practice as a Nursing Assistant of: ALICE ONGOM, Registration No. NA00126143, Respondent.	Docket No. 01-07-B-1031NA FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

An administrative hearing was held in this matter before Health Law Judge John F. Kuntz, Presiding Officer for the Department of Health, on April 4, 2002, at 10:00 a.m., at the Department of Health, 1101 Eastside Street, Room 6, Olympia, Washington. Christopher G. Swanson, Assistant Attorney General, represented the Nursing Assistant Program of the Department of Health (the Program). Alice Ongom (the Respondent), appeared and was not represented by an attorney. Robert Lewis, certified court reporter, recorded the proceedings.

Having considered the testimony and evidence presented in this matter, the Presiding Officer now enters the following:

I. PROCEDURAL HISTORY

1.1 On September 11, 2001, the Program issued a Statement of Charges against the Respondent, Alice Ongom, alleging she engaged in unprofessional conduct in violation of

RCW 18.130.180(24). This document was served, by mail, upon the Respondent at the address on file with the Program: 32324 4th Place S., Q4, Federal Way, Washington 98003.

1.2 The Adjudicative Clerk Office issued a Notice of Failure to Respond to the parties. This document was dated September 3, 2001.

1.3 On October 4, 2001, the Adjudicative Clerk Office issued a Notice of Failure to Respond (Corrected Service date).

1.4 On October 30, 2001, the Program again served the Respondent, by mail, with the Statement of Charges. This set of charges was served at the Respondent's new address on file with the Program: 33011 27th Avenue SW, Federal Way, Washington 98023.

1.5 On November 29, 2001, the Adjudicative Clerk Office issued a Notice of Failure to Respond to the parties. This notice was served, by mail, on the Respondent at the address on file with the Program: 33011 27th Avenue SW, Federal Way, Washington 98023.

1.6 On December 3, 2001, the Respondent filed her Answer to Statement of Charges with the Adjudicative Clerk office. The Respondent requested an opportunity for settlement, and an administrative hearing in the event the parties were unable to reach settlement in this matter.

1.7 On December 3, 2001, the Hearing Scheduler from the Adjudicative Clerk Office sent a memorandum to the Assistant Attorney General representing the Program. The memorandum

advised the Assistant Attorney General to disregard the Notice of Failure to Respond issued on November 29, 2001, as it appeared the Respondent's Answer was received by the Program and Office of Attorney General before that date.

1.8 On December 4, 2001, the Adjudicative Clerk Office served upon the parties a Scheduling Order/Notice of Hearing, scheduling a telephone prehearing conference on March 8, 2002 and a hearing on April 4, 2002.

1.9 On March 8, 2002, the Presiding Officer conducted a telephone prehearing conference with the parties.

1.10 On March 15, 2002, the Adjudicative Clerk Office issued a Notice of Hearing to the parties. This notice informed the parties that the hearing would commence on April 3, 2002, at 10:00 a.m., at the Department of Health, 1101 Eastside Street, Room 6, Olympia, Washington.

1.11 On March 28. 2002, the Presiding Officer issued an Order Defining Conduct of Hearing. **Prehearing Order. No. 1**. This order contained the stipulations and agreements entered into by the parties, and the orders and decisions of the Presiding Officer. Pursuant to the terms of the order, the Presiding Officer reserved ruling on the Program's witnesses and exhibits until hearing. The Presiding Officer reserved ruling to allow the Respondent to receive and review a copy of the investigative file from the Program.

1.12 On April 4, 2002, the Presiding Officer conducted an in-person prehearing conference with

the parties prior to the hearing. During this prehearing conference the Presiding Officer admitted the exhibits previously offered by the Program, and allowed the appearance of the two identified Program witnesses (see paragraph 2.2 below). The Respondent did not object to the admission of the Program documents or appearance of the Program witnesses in this matter. Additionally, the Presiding Officer admitted the Respondent's statement dated April 29, 2001 (see paragraph 2.3 below). The Program did not object to the admission of Exhibit R-2.

II. HEARING

2.1 The Program called Rebecca Bristlin and Jocelyn Umagat to testify as witnesses at the hearing. The Respondent testified, and did not call any additional witnesses to testify at hearing.

2.2 The following Program exhibits were admitted at hearing:

Exhibit D-1: A copy of the resident progress notes related to the care of Resident A from February 22, 2001 through March 1, 2001.

Exhibit D-2: A copy of the resident incident report, dated February 23, 2001.

Exhibit D-3: A copy of the sworn statement of Rebecca Bristlin, dated April 19, 2001.

Exhibit D-4: A copy of the facility investigation conducted by Krista Marti.

Exhibit D-5: A copy of a report of Resident A's February 26, 2001 visit to Leonico Panlasigui, M.D.

Exhibit D-6: A copy of the sworn statement of Jocelyn Umagat, dated April 5, 2001.

Exhibit D-7: A copy of the investigation report prepared by Candace Goehring, R.N., BSN.

2.3 The following Respondent exhibit [sic] was admitted at hearing:

Exhibit R-1: Affidavit of Franciska Chemielewski, dated December 28, 2001.

Exhibit R-2: Statement of Alice Ongom, dated April 29, 2001.

III. FINDINGS OF FACT

3.1 Alice Ongom, the Respondent, was issued a registration to practice as a nursing assistant in the state of Washington in July 2000, and was registered at all times material hereto.

3.2 Rebecca Bristlin was employed as a caregiver at the Woodmark at Steel Lake, Federal Way, Washington (Woodmark) during 2001. Ms. Bristlin described Woodmark as a retirement home, and stated the facility houses Alzheimer's patients in a special care unit. In her job as a caregiver, Ms. Bristlin provided the residents with their daily assisted living needs (e.g., dressing, feeding and hygiene needs). During her employment at Woodmark, Ms. Bristlin was familiar with

Resident A. Ms. Bristlin knew this resident to be a combative-type person (see also Exhibit R-1).

3.3 On February 22, 2001, Ms. Bristlin observed the Respondent engage in abusive behavior toward Resident during the dinner hour. Ms. Bristlin, from a vantage point behind and slightly to one side of the Respondent, observed the Respondent pick up a cup or dish from the floor and throw this cup/dish at the resident. Additionally, the Respondent was observed to slap Resident A on the hand several times (perhaps three or four times). Immediately after slapping her on the hands, the Respondent also kicked Resident A on the left ankle or lower leg.

3.4 Ms. Bristlin did not report the above incident to management until February 23, 2001. In hindsight, she realized delaying her report was a mistake. Ms. Bristlin decided she would report this incident to Ms. Gorham, a nurse the witness was familiar and comfortable with from working with her during the day shift. Ms. Bristlin decided that removing Resident A from the area was the best way to defuse the situation and/or protect Resident A from further harm. Ms. Bristlin did make entries to the Resident Progress Notes on file for Resident A (see Exhibit D-1, page 1) regarding the incident.

3.5 Jocelyn Umagat, L.P.N., has been employed at the Woodmark as a Program Director for the last two years. She was initially employed to work as a licensed practical nurse, but was promoted to the Program Director position for the special care unit after four months. Ms. Umagat knew the Respondent, as she hired the Respondent

to work as a registered nursing assistant and/or caregiver for the Woodmark. Ms. Umagat also provided training to the Respondent in the area of resident safety, including how to identify and report any incidents of resident abuse.

3.6 Ms. Umagat described Resident A as an individual who was in the latter stages of Alzheimer's. Resident A also suffered from high blood pressure. Following the reported incident, Ms. Umagat examined Resident A. The resident had a half-dollar sized bruise on her lower left extremity, and the bruised area was slightly hot to the touch. Resident A received medical attention for this injury (see Exhibits D-1 and D-5).

3.7 In her position as Program Director Ms. Umagat interviewed all of the witnesses or participants involved with the incident on February 22, 2001, including Rebecca Bristlin, Franciska Chemielewski and the Respondent. Based on Ms. Bristlin's report, and the resident's injuries, Ms. Umagat believed the incident occurred as reported. Ms. Umagat filled out a Resident Incident Report (see Exhibit D-2) and reported her findings to the acting executive director for the facility.

3.8 Ms. Umagat spoke with the Respondent regarding the incident. The Respondent denied throwing anything at Resident A, and explained that she was trying to reach the resident's hand to prevent her (the resident) from throwing anything at her (the Respondent). The Respondent initially denied kicking Resident A, but at a later point in the discussion she stated she tripped over Resident A's leg. Following the discussion, Ms. Umagat notified

the Respondent she was being terminated from working at the facility based on her conduct during the incident (see Exhibit D-6).

3.9 The Respondent denied throwing the dish at Resident A after picking it up. In fact, the Respondent contended Resident A was violent toward her from the first day of her employment at the Woodmark. Resident A also made racist comments to the Respondent at various times while the Respondent provided care to the resident. The Respondent holds no anger toward Resident A, as she understands the resident is "sick" and not responsible for her actions.

3.10 During her testimony, the Respondent referred to her April 2001 statement regarding the incident of February 22, 2001 (see Exhibit R-2). The Respondent recalled that Resident A threw silverware and/or dishes at the Respondent. The Respondent stated she suffered an injury to her shoulder as a result of being hit by the dish thrown by Resident A. The dish then fell to the floor. The Respondent denies picking the dish up at any time. The Respondent grabbed a plate from Resident A to prevent further injury, and attempted to grab Resident A's hands to stop the resident's violent behavior. The Respondent remembered asking Resident A not to throw dishes at her at least three times, to no avail. The Respondent requested help from the other caregivers present in the room, but stated she received no help in response to her requests.

3.11 The Respondent stated her version of the event is supported by an affidavit signed by

Franciska Chemielewski (see Exhibit R-1). According to her statement in the affidavit, Ms. Chemielewski did not observe the Respondent throw anything at Resident A.

3.12 The Respondent noted that Resident A's described injuries were inconsistent with the "abuse" which she was alleged to have committed against the resident. For example, Resident A has no wrist injuries described in her treatment records. Additionally, the ankle/lower left extremity injury was not consistent with the type of repeated trauma described in the incident report.

IV. CONCLUSIONS OF LAW

4.1 The Secretary of Health has jurisdiction over the Respondent and over the subject matter of this administrative proceeding. RCW 18.88A.050 and RCW 18.88A.150. See also WAC 246-10-101 through WAC 246-10-103. In this case the Secretary delegated this jurisdictional authority to the Presiding Officer.

4.2 The Secretary of Health has the authority to discipline nursing assistants under the Uniform Disciplinary Act, chapter 18.130 RCW. RCW 18.130.160. In this case the Secretary of Health delegated this disciplinary authority to the Presiding Officer.

4.3 The Program bears the burden of proving the factual allegations set forth in the Statement of Charges by a preponderance of the evidence. WAC 246-10-606. The Presiding Officer recognizes that the Washington State Supreme Court has held the standard of proof in disciplinary proceedings

against physicians before the Washington State Medical Quality Assurance Commission is now proof by clear and convincing evidence. *Bang Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert denied*, 535 U.S. __ (2002) (No. 01-734, issued March 4, 2002). Further, the Washington Court of Appeals has since held that *Bang Nguyen* should not necessarily be extended [sic] disciplinary proceedings against all professionals. *Eidson v. Department of Licensing*, 108 Wn.App. [sic] 712, 32 P.3d 109 (2001).

4.4 Given the legal uncertainly regarding the standard of proof in disciplinary proceedings against the nursing assistant professions, the Presiding Officer concludes the standard of proof in this proceeding shall remain preponderance of the evidence, pending further legislative or judicial guidance on this issue. However, recognizing that the standard of proof applicable to this proceeding may subsequently be determined to be clear and convincing evidence, the Presiding Officer elects to consider the evidence under both the clear and convincing standard, as well as the preponderance of the evidence standard.

4.5 RCW 18.130.180(24) defines unprofessional conduct to include "abuse of a client or patient or sexual conduct with a client or patient". Based on Findings of Fact 3.2 through 3.12, the Presiding Officer concludes the Program has proven by a preponderance of the evidence, but not by clear and convincing evidence, that the Respondent's conduct violated RCW 18.130.180(24) (regarding abuse of a client). The Presiding Officer concludes this violation was moderate in nature.

4.6 The Presiding Officer concludes the Program did not prove its case by clear and convincing evidence. The Presiding Officer concludes this is so because there are conflicting witness statements whether the Respondent touched Resident A or threw anything at Resident A. Additionally, there was a period of time between the time the incident in question, and when Resident A's injury was diagnosed or assessed. Finally, the [sic] was evidence to show that Resident A was combative and known to kick out on her own. While the evidence provided by the Program is of the type that "reasonably prudent persons are accustomed to rely upon in the conduct of their affairs" (see WAC 246-10-606), it is not of the type that is "highly probable" (see *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn.App. [sic] 454 (1998)), following a review and consideration of all of the evidence in the record.

4.7 Upon a finding of unprofessional conduct, the Secretary of Health has the authority to order appropriate sanctions. RCW 18.130.160. In this case the Secretary of Health delegated the authority to order sanctions to the Presiding Officer. In determining what action is appropriate, the Presiding Officer must first consider what sanctions are necessary to protect or compensate the public. RCW 18.130.160. Only after such provisions have been made may the Presiding Officer consider and include in the order requirements designed to rehabilitate the license holder or applicant. RCW 18.130.160.

4.8 Based on his conclusions in paragraphs 4.5 and 4.6 above, the Presiding Officer concludes the Respondent's conduct constitutes unprofessional

conduct and that sanctions are required in this matter.

V. ORDER

Based on the foregoing Procedural History, Findings of Fact and Conclusions of Law, the Presiding Officer issues the following ORDERS:

5.1 The registration to practice as a nursing assistant in the state of Washington for the Respondent, Alice Ongom, is SUSPENDED for a period of 24 months from the date of service of this Order.

5.2 Within 10 days of the date of service of this Order, the Respondent shall thoroughly complete the attached Healthcare Integrity and Protection Data Bank Reporting Form (Section 1128 of the Social Security Act) and return the completed form to the Nursing Assistant Program.

5.3 The protective order adopted by the Presiding Officer in Prehearing Order No. 1 is hereby adopted as a part of this Order, pursuant to WAC 246-10-405: **THE PRESIDING OFFICER HEREBY ADOPTS AS A PART OF THIS FINAL ORDER A PROTECTIVE ORDER. THE PRESIDING OFFICER PROHIBITS FROM PUBLIC DISCLOSURE ANY AND ALL HEALTH CARE INFORMATION CONTAINED IN THE EXHIBITS LISTED ABOVE, EXCEPT AS PROVIDED IN CHAPTER 70.02 RCW, OR BY ORDER OF A DEPARTMENT OF HEALTH PRESIDING OFFICER OR ORDER BY A COURT OF COMPETENT JURISDICTION.**

VI. NOTICE TO PARTIES

As provided in RCW 34.05.461(3), RCW 34.05.470 and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed within 10 days of service of this Order with the Adjudicative Clerk office, 1107 Eastside Street, PO Box 47879, Olympia, WA 98504-7879. The petition for reconsideration must state the specific grounds upon which reconsideration is being requested, and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the Adjudicative Clerk office has not acted on the petition or served written notice of the date by which action will be taken on the petition.

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

DATED THIS *2nd* DAY OF JULY, 2002.

//s//

JOHN F. KUNTZ, Health Law Judge
Presiding Officer

Wash. Const. art. XX, § 2

Regulations concerning medicine, surgery and pharmacy. The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

Chapter 18.88A
Nursing Assistants

RCW 18.88A.010
Legislative declaration.

The legislature takes special note of the contributions made by nursing assistants in health care facilities whose tasks are arduous and whose working conditions may be contributing to the high and often critical turnover among the principal cadre of health care workers who provide for the basic needs of patients. The legislature also recognizes the growing shortage of nurses as the proportion of the elderly population grows and as the acuity of patients in hospitals and nursing homes becomes generally more severe.

The legislature finds and declares that occupational nursing assistants should have a formal system of educational and experiential qualifications leading to career mobility and advancement. The establishment of such a system should bring about a more stabilized work force in health care facilities, as well as provide a valuable resource for recruitment into licensed nursing practice.

The legislature finds that the quality of patient care in health care facilities is dependent upon the competence of the personnel who staff their facilities. To assure the availability of trained personnel in health care facilities the legislature recognizes the need for training programs for nursing assistants.

The legislature declares that the registration of nursing assistants and providing for voluntary certification of those who wish to seek higher levels of qualification is in the interest of the public health, safety, and welfare.

RCW 18.88A.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of health.

(2) "Secretary" means the secretary of health.

(3) "Commission" means the Washington nursing care quality assurance commission.

(4) "Nursing assistant" means an individual, regardless of title, who, under the direction and supervision of a registered nurse or licensed practical nurse, assists in the delivery of nursing and nursing-related activities to patients in a health care facility. The two levels of nursing assistants are (a) "nursing assistant-certified," an individual certified under this chapter, (b) "nursing assistant-registered," an individual registered under this chapter.

(5) "Approved training program" means a nursing assistant-certified training program approved by the commission. For community college, vocational-technical institutes, skill centers, and secondary school as defined in chapter 28B.50 RCW, nursing assistant-certified training programs shall

be approved by the commission in cooperation with the board for community and technical colleges or the superintendent of public instruction.

(6) "Health care facility" means a nursing home, hospital, hospice care facility, home health care agency, hospice agency, or other entity for delivery of health care services as defined by the commission.

(7) "Competency evaluation" means the measurement of an individual's knowledge and skills as related to safe, competent performance as a nursing assistant.

RCW 18.88A.030

Scope of practice — Voluntary certification — Rules.

(1) A nursing assistant may assist in the care of individuals as delegated by and under the direction and supervision of a licensed (registered) nurse or licensed practical nurse.

(2) A health care facility shall not assign a nursing assistant-registered to provide care until the nursing assistant-registered has demonstrated skills necessary to perform competently all assigned duties and responsibilities.

(3) Nothing in this chapter shall be construed to confer on a nursing assistant the authority to administer medication unless delegated as a specific nursing task pursuant to this chapter or to practice as a licensed (registered) nurse or licensed practical nurse as defined in chapter 18.79 RCW.

(4) Certification is voluntary for nursing assistants working in health care facilities other than nursing homes unless otherwise required by state or federal law or regulation.

(5) The commission may adopt rules to implement the provisions of this chapter.

RCW 18.88A.040

Registration and certification.

(1) No person may practice or represent himself or herself as a nursing assistant-registered by use of any title or description without being registered by the department pursuant to this chapter.

(2) After October 1, 1990, no person may by use of any title or description, practice or represent himself or herself as a nursing assistant-certified without applying for certification, meeting the qualifications, and being certified by the department pursuant to this chapter.

RCW 18.88A.050

Powers of secretary.

In addition to any other authority provided by law, the secretary has the authority to:

(1) Set all certification, registration, and renewal fees in accordance with RCW 43.70.250 and to collect and deposit all such fees in the health professions account established under RCW 43.70.320;

(2) Establish forms, procedures, and examinations necessary to administer this chapter;

(3) Hire clerical, administrative, and investigative staff as needed to implement this chapter;

(4) Issue a registration to any applicant who has met the requirements for registration;

(5) After January 1, 1990, issue a certificate to any applicant who has met the education, training, and conduct requirements for certification;

(6) Maintain the official record for the department of all applicants and persons with registrations and certificates;

(7) Exercise disciplinary authority as authorized in chapter 18.130 RCW;

(8) Deny registration to any applicant who fails to meet requirement for registration;

(9) Deny certification to applicants who do not meet the education, training, competency evaluation, and conduct requirements for certification.

RCW 18.88A.060

Commission — Powers.

In addition to any other authority provided by law, the commission may:

(1) Determine minimum education requirements and approve training programs;

(2) Prepare, grade, and administer, or determine the nature of, and supervise the grading

and administration of, examinations of training and competency for applicants for certification;

(3) Determine whether alternative methods of training are equivalent to approved training programs, and establish forms, procedures, and criteria for evaluation of an applicant's alternative training to determine the applicant's eligibility to take any qualifying examination for certification;

(4) Define and approve any experience requirement for certification;

(5) Adopt rules implementing a continuing competency evaluation program;

(6) Adopt rules to enable it to carry into effect the provisions of this chapter.

RCW 18.88A.080

Registration requirements.

(1) The secretary shall issue a registration to any applicant who pays any applicable fees and submits, on forms provided by the secretary, the applicant's name, address, and other information as determined by the secretary, provided there are no grounds for denial of registration or issuance of a conditional registration under this chapter or chapter 18.130 RCW.

(2) Applicants must file an application with the commission for registration within three days of employment.

RCW 18.88A.085

Certification of requirements.

(1) After January 1, 1990, the secretary shall issue a certificate to any applicant who demonstrates to the secretary's satisfaction that the following requirements have been met:

(a) Completion of an approved training program or successful completion of alternate training meeting established criteria approved by the commission; and

(b) Successful completion of a competency evaluation.

(2) In addition, applicants shall be subject to the grounds for denial of certification under chapter 18.130 RCW.

RCW 18.88A.090

Examinations.

(1) The date and location of examinations shall be established by the secretary. Applicants who have been found by the secretary to meet the requirements for certification shall be scheduled for the next examination following the filing of the application. The secretary shall establish by rule the examination application deadline.

(2) The commission shall examine each applicant, by a written or oral and a manual component of competency evaluation. Examinations shall be limited to the purpose of determining

whether the applicant possesses the minimum skill and knowledge necessary to practice competently.

(3) The examination papers, all grading of the papers, and the grading of skills demonstration shall be preserved for a period of not less than one year after the commission has made and published the decisions. All examinations shall be conducted under fair and wholly impartial methods.

(4) Any applicant failing to make the required grade in the first examination may take up to three subsequent examinations as the applicant desires upon prepaying a fee determined by the secretary under RCW 43.70.250 for each subsequent examination. Upon failing four examinations, the secretary may invalidate the original application and require such remedial education before the person may take future examinations.

(5) The commission may approve an examination prepared or administered by a private testing agency or association of licensing agencies for use by an applicant in meeting the credentialing requirements.

RCW 18.88A.110

Certificates for applicants credentialed in another state.

An applicant holding a credential in another state may be certified by endorsement to practice in this state without examination if the secretary determines that the other state's credentialing standards are substantially equivalent to the standards in this state.

RCW 18.88A.120

Applications for registration and certification — Fee.

Applications for registration and certification shall be submitted on forms provided by the secretary. The secretary may require any information and documentation that reasonably relates to the need to determine whether the applicant meets the criteria for registration and certification credentialing provided for in this chapter and chapter 18.130 RCW. Each applicant shall comply with administrative procedures, administrative requirements, and fees determined by the secretary under RCW 43.70.250 and 43.70.280.

RCW 18.88A.130

Renewal of registration or certification.

Registrations and certifications shall be renewed according to administrative procedures, administrative requirements, and fees determined by the secretary under RCW 43.70.250 and 43.70.280.

RCW 18.88A.150

Application of uniform disciplinary act.

The uniform disciplinary act, chapter 18.130 RCW, governs unregistered or uncertified practice, issuance of certificates and registrations, and the discipline of persons registered or with certificates under this chapter. The secretary shall be the disciplinary authority under this chapter.

RCW 18.88A.200

Delegation of nursing care tasks — Legislative finding.

The legislature recognizes that nurses have been successfully delegating nursing care tasks to family members and auxiliary staff for many years. The opportunity for a nurse to delegate to nursing assistants qualifying under RCW 18.88A.210 may enhance the viability and quality of health care services in community-based care settings and in-home care settings to allow individuals to live as independently as possible with maximum safeguards.

RCW 18.88A.210

Delegation — Generally.

(1) A nursing assistant meeting the requirements of this section who provides care to individuals in community-based care settings or in-home care settings, as defined in RCW 18.79.260(3), may accept delegation of nursing care tasks by a registered nurse as provided in RCW 18.79.260(3).

(2) For the purposes of this section, "nursing assistant" means a nursing assistant-registered or a nursing assistant-certified. Nothing in this section may be construed to affect the authority of nurses to delegate nursing tasks to other persons, including licensed practical nurses, as authorized by law.

(3) Before commencing any specific nursing care tasks authorized under this chapter, the nursing assistant must (a) provide to the delegating

nurse a certificate of completion issued by the department of social and health services indicating the completion of basic core nurse delegation training, (b) be regulated by the department of health pursuant to this chapter, subject to the uniform disciplinary act under chapter 18.130 RCW, and (c) meet any additional training requirements identified by the nursing care quality assurance commission. Exceptions to these training requirements must adhere to RCW 18.79.260(3)(e)(v).

RCW 18.88A.230

Delegation — Liability — Reprisal or disciplinary action.

(1) The nursing assistant shall be accountable for their own individual actions in the delegation process. Nursing assistants following written delegation instructions from registered nurses performed in the course of their accurately written, delegated duties shall be immune from liability.

(2) Nursing assistants shall not be subject to any employer reprisal or disciplinary action by the secretary for refusing to accept delegation of a nursing task based on patient safety issues. No community-based care setting as defined in RCW 18.79.260(3)(e), or in-home services agency as defined in RCW 70.127.010, may discriminate or retaliate in any manner against a person because the person made a complaint or cooperated in the investigation of a complaint.

Chapter 18.130

Regulation Of Health Professionals Uniform Disciplinary Act

RCW 18.130.010

Intent.

It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts.

It is also the intent of the legislature that all health and health-related professions newly credentialed by the state come under the Uniform Disciplinary Act.

Further, the legislature declares that the addition of public members on all health care commissions and boards can give both the state and the public, which it has a statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care.

RCW 18.130.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Disciplining authority" means the agency, board, or commission having the authority to take disciplinary action against a holder of, or applicant for, a professional or business license upon a finding of a violation of this chapter or a chapter specified under RCW 18.130.040.

(2) "Department" means the department of health.

(3) "Secretary" means the secretary of health or the secretary's designee.

(4) "Board" means any of those boards specified in RCW 18.130.040.

(5) "Commission" means any of the commissions specified in RCW 18.130.040.

(6) "Unlicensed practice" means:

(a) Practicing a profession or operating a business identified in RCW 18.130.040 without holding a valid, unexpired, unrevoked, and unsuspended license to do so; or

(b) Representing to a consumer, through offerings, advertisements, or use of a professional title or designation, that the individual is qualified to practice a profession or operate a business identified in RCW 18.130.040, without holding a valid,

unexpired, unrevoked, and unsuspended license to do so.

(7) "Disciplinary action" means sanctions identified in RCW 18.130.160.

(8) "Practice review" means an investigative audit of records related to the complaint, without prior identification of specific patient or consumer names, or an assessment of the conditions, circumstances, and methods of the professional's practice related to the complaint, to determine whether unprofessional conduct may have been committed.

(9) "Health agency" means city and county health departments and the department of health.

(10) "License," "licensing," and "licensure" shall be deemed equivalent to the terms "license," "licensing," "licensure," "certificate," "certification," and "registration" as those terms are defined in RCW 18.120.020.

RCW 18.130.040

Application to certain professions — Authority of secretary — Grant or denial of licenses — Procedural rules.

(1) This chapter applies only to the secretary and the boards and commissions having jurisdiction in relation to the professions licensed under the chapters specified in this section. This chapter does not apply to any business or profession not licensed under the chapters specified in this section.

(2) (a) The secretary has authority under this chapter in relation to the following professions:

(i) Dispensing opticians licensed and designated apprentices under chapter 18.34 RCW;

(ii) Naturopaths licensed under chapter 18.36A RCW;

(iii) Midwives licensed under chapter 18.50 RCW;

(iv) Ocularists licensed under chapter 18.55 RCW;

(v) Massage operators and businesses licensed under chapter 18.108 RCW;

(vi) Dental hygienists licensed under chapter 18.29 RCW;

(vii) Acupuncturists licensed under chapter ~~18~~.06 RCW;

(viii) Radiologic technologists certified and X-ray technicians registered under chapter 18.84 RCW;

(ix) Respiratory care practitioners licensed under chapter 18.89 RCW;

(x) Persons registered under chapter 18.19 RCW;

(xi) Persons licensed as mental health counselors, marriage and family therapists, and social workers under chapter 18.225 RCW;

(xii) Persons registered as nursing pool operators under chapter 18.52C RCW;

(xiii) Nursing assistants registered or certified under chapter 18.88A RCW;

(xiv) Health care assistants certified under chapter 18.135 RCW;

(xv) Dietitians and nutritionists certified under chapter 18.138 RCW;

(xvi) Chemical dependency professionals certified under chapter 18.205 RCW;

(xvii) Sex offender treatment providers and certified affiliate sex offender treatment providers certified under chapter 18.155 RCW;

(xviii) Persons licensed and certified under chapter 18.73 RCW or RCW 18.71.205;

(xix) Denturists licensed under chapter 18.30 RCW;

(xx) Orthotists and prosthetists licensed under chapter 18.200 RCW;

(xxi) Surgical technologists registered under chapter 18.215 RCW; and

(xxii) Recreational therapists.

(b) The boards and commissions having authority under this chapter are as follows:

(i) The podiatric medical board as established in chapter 18.22 RCW;

(ii) The chiropractic quality assurance commission as established in chapter 18.25 RCW;

(iii) The dental quality assurance commission as established in chapter 18.32 RCW;

(iv) The board of hearing and speech as established in chapter 18.35 RCW;

(v) The board of examiners for nursing home administrators as established in chapter 18.52 RCW;

(vi) The optometry board as established in chapter 18.54 RCW governing licenses issued under chapter 18.53 RCW;

(vii) The board of osteopathic medicine and surgery as established in chapter 18.57 RCW governing licenses issued under chapters 18.57 and 18.57A RCW;

(viii) The board of pharmacy as established in chapter 18.64 RCW governing licenses issued under chapters 18.64 and 18.64A RCW;

(ix) The medical quality assurance commission as established in chapter 18.71 RCW governing licenses

and registrations issued under chapters 18.71 and 18.71A RCW;

(x) The board of physical therapy as established in chapter 18.74 RCW;

(xi) The board of occupational therapy practice as established in chapter 18.59 RCW;

(xii) The nursing care quality assurance commission as established in chapter 18.79 RCW governing licenses and registrations issued under that chapter;

(xiii) The examining board of psychology and its disciplinary committee as established in chapter 18.83 RCW; and

(xiv) The veterinary board of governors as established in chapter 18.92 RCW.

(3) In addition to the authority to discipline license holders, the disciplining authority has the authority to grant or deny licenses based on the conditions and criteria established in this chapter and the chapters specified in subsection (2) of this section. This chapter also governs any investigation, hearing, or proceeding relating to denial of licensure or issuance of a license conditioned on the applicant's compliance with an order entered pursuant to RCW 18.130.160 by the disciplining authority.

(4) All disciplining authorities shall adopt procedures to ensure substantially consistent application of this chapter, the Uniform Disciplinary

Act, among the disciplining authorities listed in subsection (2) of this section.

RCW 18.130.050

Authority of disciplining authority.

The disciplining authority has the following authority:

(1) To adopt, amend, and rescind such rules as are deemed necessary to carry out this chapter;

(2) To investigate all complaints or reports of unprofessional conduct as defined in this chapter and to hold hearings as provided in this chapter;

(3) To issue subpoenas and administer oaths in connection with any investigation, hearing, or proceeding held under this chapter;

(4) To take or cause depositions to be taken and use other discovery procedures as needed in any investigation, hearing, or proceeding held under this chapter;

(5) To compel attendance of witnesses at hearings;

(6) In the course of investigating a complaint or report of unprofessional conduct, to conduct practice reviews;

(7) To take emergency action ordering summary suspension of a license, or restriction or limitation of the license holder's practice pending proceedings by the disciplining authority. Consistent with RCW 18.130.370, a disciplining authority shall issue a summary suspension of the license or

temporary practice permit of a license holder prohibited from practicing a health care profession in another state, federal, or foreign jurisdiction because of an act of unprofessional conduct that is substantially equivalent to an act of unprofessional conduct prohibited by this chapter or any of the chapters specified in RCW 18.130.040. The summary suspension remains in effect until proceedings by the Washington disciplining authority have been completed;

(8) To use a presiding officer as authorized in RCW 18.130.095(3) or the office of administrative hearings as authorized in chapter 34.12 RCW to conduct hearings. The disciplining authority shall make the final decision regarding disposition of the license unless the disciplining authority elects to delegate in writing the final decision to the presiding officer;

(9) To use individual members of the boards to direct investigations. However, the member of the board shall not subsequently participate in the hearing of the case;

(10) To enter into contracts for professional services determined to be necessary for adequate enforcement of this chapter;

(11) To contract with licensees or other persons or organizations to provide services necessary for the monitoring and supervision of licensees who are placed on probation, whose professional activities are restricted, or who are for any authorized purpose subject to monitoring by the disciplining authority;

(12) To adopt standards of professional conduct or practice;

(13) To grant or deny license applications, and in the event of a finding of unprofessional conduct by an applicant or license holder, to impose any sanction against a license applicant or license holder provided by this chapter;

(14) To designate individuals authorized to sign subpoenas and statements of charges;

(15) To establish panels consisting of three or more members of the board to perform any duty or authority within the board's jurisdiction under this chapter;

(16) To review and audit the records of licensed health facilities' or services' quality assurance committee decisions in which a licensee's practice privilege or employment is terminated or restricted. Each health facility or service shall produce and make accessible to the disciplining authority the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to discovery or introduction into evidence in any civil action pursuant to RCW 70.41.200(3).

RCW 18.130.080

Unprofessional conduct — Complaint — Investigation — Immunity of complainant.

(1) A person, including but not limited to consumers, licensees, corporations, organizations, health care facilities, impaired practitioner

programs, or voluntary substance abuse monitoring programs approved by disciplining authorities, and state and local governmental agencies, may submit a written complaint to the disciplining authority charging a license holder or applicant with unprofessional conduct and specifying the grounds therefor or to report information to the disciplining authority, or voluntary substance abuse monitoring program, or an impaired practitioner program approved by the disciplining authority, which indicates that the license holder may not be able to practice his or her profession with reasonable skill and safety to consumers as a result of a mental or physical condition. If the disciplining authority determines that the complaint merits investigation, or if the disciplining authority has reason to believe, without a formal complaint, that a license holder or applicant may have engaged in unprofessional conduct, the disciplining authority shall investigate to determine whether there has been unprofessional conduct. In determining whether or not to investigate, the disciplining authority shall consider any prior complaints received by the disciplining authority, any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any comparable action taken by other state disciplining authorities.

(2) Notwithstanding subsection (1) of this section, the disciplining authority shall initiate an investigation in every instance where the disciplining authority receives information that a health care provider has been disqualified from participating in the federal medicare program, under Title XVIII of the federal social security act, or the

federal medicaid program, under Title XIX of the federal social security act.

(3) A person who files a complaint or reports information under this section in good faith is immune from suit in any civil action related to the filing or contents of the complaint.

RCW 18.130.090 (2004)

Statement of charge — Request for hearing.

(1) If the disciplining authority determines, upon investigation, that there is reason to believe a violation of RCW 18.130.180 has occurred, a statement of charge or charges shall be prepared and served upon the license holder or applicant at the earliest practical time. The statement of charge or charges shall be accompanied by a notice that the license holder or applicant may request a hearing to contest the charge or charges. The license holder or applicant must file a request for hearing with the disciplining authority within twenty days after being served the statement of charges. If the twenty-day limit results in a hardship upon the license holder or applicant, he or she may request for good cause an extension not to exceed sixty additional days. If the disciplining authority finds that there is good cause, it shall grant the extension. The failure to request a hearing constitutes a default, whereupon the disciplining authority may enter a decision on the basis of the facts available to it.

(2) If a hearing is requested, the time of the hearing shall be fixed by the disciplining authority as soon as convenient, but the hearing shall not be

held earlier than thirty days after service of the charges upon the license holder or applicant.

RCW 18.130.095 (2004)

Uniform procedural rules.

(1) (a) The secretary, in consultation with the disciplining authorities, shall develop uniform procedural rules to respond to public inquiries concerning complaints and their disposition, active investigations, statement of charges, findings of fact, and final orders involving a licensee, applicant, or unlicensed person. The uniform procedural rules adopted under this subsection apply to all adjudicative proceedings conducted under this chapter and shall include provisions for establishing time periods for initial assessment, investigation, charging, discovery, settlement, and adjudication of complaints, and shall include enforcement provisions for violations of the specific time periods by the department, the disciplining authority, and the respondent. A licensee must be notified upon receipt of a complaint, except when the notification would impede an effective investigation. At the earliest point of time the licensee must be allowed to submit a written statement about that complaint, which statement must be included in the file. Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.17 RCW until the complaint has been initially assessed and determined to warrant an investigation

by the disciplining authority. Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department. Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection. Complaints determined to warrant no cause for action after investigation are subject to public disclosure, must include an explanation of the determination to close the complaint, and must remain in the records and tracking system of the department.

(b) The secretary, on behalf of the disciplining authorities, shall enter into interagency agreements for the exchange of records, which may include complaints filed but not yet assessed, with other state agencies if access to the records will assist those agencies in meeting their federal or state statutory responsibilities. Records obtained by state agencies under the interagency agreements are subject to the limitations on disclosure contained in (a) of this subsection.

(2) The uniform procedures for conducting investigations shall provide that prior to taking a written statement:

(a) For violation of this chapter, the investigator shall inform such person, in

writing of: (i) The nature of the complaint; (ii) that the person may consult with legal counsel at his or her expense prior to making a statement; and (iii) that any statement that the person makes may be used in an adjudicative proceeding conducted under this chapter; and

(b) From a witness or potential witness in an investigation under this chapter, the investigator shall inform the person, in writing, that the statement may be released to the licensee, applicant, or unlicensed person under investigation if a statement of charges is issued.

(3) Only upon the authorization of a disciplining authority identified in RCW 18.130.040(2)(b), the secretary, or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplining authority authorized under this chapter. Except as provided in RCW 18.130.050(8), the presiding officer shall not vote on or make any final decision. All functions performed by the presiding officer shall be subject to chapter 34.05 RCW. The secretary, in consultation with the disciplining authorities, shall adopt procedures for implementing this subjection.

(4) The uniform procedural rules shall be adopted by all disciplining authorities listed in RCW 18.130.040(2), and shall be used for all adjudicative proceedings conducted under this chapter, as defined by chapter 34.05 RCW. The uniform procedural rules shall address the use of a presiding officer authorized in subsection (3) of this section to

determine and issue decisions on all legal issues and motions arising during adjudicative proceedings.

RCW 18.130.100 (2004)

Hearings — Adjudicative proceedings under chapter 34.05 RCW.

The procedures governing adjudicative proceedings before agencies under chapter 34.05 RCW, the Administrative Procedure Act, govern all hearings before the disciplining authority. The disciplining authority has, in addition to the powers and duties set forth in this chapter, all of the powers and duties under chapter 34.05 RCW, which include, without limitation, all powers relating to the administration of oaths, the receipt of evidence, the issuance and enforcing of subpoenas, and the taking of depositions.

RCW 18.130.110 (2004)

Findings of fact — Order — Report.

(1) In the event of a finding of unprofessional conduct, the disciplining authority shall prepare and serve findings of fact and an order as provided in chapter 34.05 RCW, the Administrative Procedure Act. if the license holder or applicant is found to have not committed unprofessional conduct, the disciplining authority shall forthwith prepare and serve findings of fact and an order of dismissal of the charges, including public exoneration of the licensee or applicant. The findings of fact and order shall be

retained by the disciplining authority as a permanent record.

(2) The disciplining authority shall report the issuance of statements of charges and final orders in cases processed by the disciplining authority to:

(a) The person or agency who brought to the disciplining authority's attention information which resulted in the initiation of the case;

(b) Appropriate organizations, public or private, which serve the professions;

(c) The public. Notification of the public shall include press releases to appropriate local news media and the major news wire services; and

(d) Counterpart licensing boards in other states, or associations of state licensing boards.

(3) This section shall not be construed to require the reporting of any information which is exempt from public disclosure under chapter 42.17 RCW.

RCW 18.130.120

Actions against license — Exception.

The department shall not issue any license to any person whose license has been denied, revoked, or suspended by the disciplining authority except in conformity with the terms and conditions of the certificate or order of denial, revocation, or

suspension, or in conformity with any order of reinstatement issued by the disciplining authority, or in accordance with the final judgment in any proceeding for review instituted under this chapter.

RCW 18.130.130

Orders — When effective — Stay.

An order pursuant to proceedings authorized by this chapter, after due notice and findings in accordance with this chapter and chapter 34.05 RCW, or an order of summary suspension entered under this chapter, shall take effect immediately upon its being served. The order, if appealed to the court, shall not be stayed pending the appeal unless the disciplining authority or court to which the appeal is taken enters an order staying the order of the disciplining authority, which stay shall provide for terms necessary to protect the public.

RCW 18.130.150

Reinstatement.

A person whose license has been suspended or revoked under this chapter may petition the disciplining authority for reinstatement after an interval as determined by the disciplining authority in the order. The disciplining authority shall hold hearings on the petition and may deny the petition or may order reinstatement and impose terms and conditions as provided in RCW 18.130.160 and issue an order of reinstatement. The disciplining authority

may require successful completion of an examination as a condition of reinstatement.

A person whose license has been suspended for noncompliance with a support order or a residential or visitation order under RCW 74.20A.320 may petition for reinstatement at any time by providing the secretary a release issued by the department of social and health services stating that the person is in compliance with the order. If the person has continued to meet all other requirements for reinstatement during the suspension, the secretary shall automatically reissue the person's license upon receipt of the release, and payment of a reinstatement fee, if any.

RCW 18.130.160

Finding of unprofessional conduct — Orders — Sanctions — Stay — Costs — Stipulations.

Upon a finding, after hearing, that a license holder or applicant has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority may consider the imposition of sanctions, taking into account any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any action taken by other in-state or out-of-state disciplining authorities, and issue an order providing for one or any combination of the following:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation. Funds received shall be placed in the health professions account;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fees billed to and collected from the consumer;

(12) A surrender of the practitioner's license in lieu of other sanctions, which must be reported to the federal data bank.

Any of the actions under this section may be totally or partly stayed by the disciplining authority. Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority and in determining what action is appropriate, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder or

applicant. All costs associated with compliance with orders issued under this section are the obligation of the license-holder or applicant.

The licensee or applicant may enter into a stipulated disposition of charges that includes one or more of the sanctions of this section, but only after a statement of charges has been issued and the licensee has been afforded the opportunity for a hearing and has elected on the record to forego such a hearing. The stipulation shall either contain one or more specific findings of unprofessional conduct or inability to practice, or a statement by the licensee acknowledging that evidence is sufficient to justify one or more specified findings of unprofessional conduct or inability to practice. The stipulation entered into pursuant to this subsection shall be considered formal disciplinary action for all purposes.

RCW 18.130.170

Capacity of license holder to practice — Hearing — Mental or physical examination — Implied consent.

(1) If the disciplining authority believes a license holder or applicant may be unable to practice with reasonable skill and safety to consumers by reason of any mental or physical condition, a statement of charges in the name of the disciplining authority shall be served on the license holder or applicant and notice shall also be issued providing an opportunity for a hearing. The hearing shall be limited to the sole issue of the capacity of the license

holder or applicant to practice with reasonable skill and safety. If the disciplining authority determines that the license holder or applicant is unable to practice with reasonable skill and safety for one of the reasons stated in this subsection, the disciplining authority shall impose such sanctions under RCW 18.130.160 as is deemed necessary to protect the public.

(2) (a) In investigating or adjudicating a complaint or report that a license holder or applicant may be unable to practice with reasonable skill or safety by reason of any mental or physical condition, the disciplining authority may require a license holder or applicant to submit to a mental or physical examination by one or more licensed or certified health professionals designated by the disciplining authority. The license holder or applicant shall be provided written notice of the disciplining authority's intent to order a mental or physical examination, which notice shall include: (i) A statement of the specific conduct, event, or circumstances justifying an examination; (ii) a summary of the evidence supporting the disciplining authority's concern that the license holder or applicant may be unable to practice with reasonable skill and safety by reason of a mental or physical condition, and the grounds for believing such evidence to be credible and reliable; (iii) a statement of the nature, purpose, scope, and content of the intended examination; (iv) a statement that the license holder or applicant has the right to respond in writing within

twenty days to challenge the disciplining authority's grounds for ordering an examination or to challenge the manner or form of the examination; and (v) a statement that if the license holder or applicant timely responds to the notice of intent, then the license holder or applicant will not be required to submit to the examination while the response is under consideration.

(b) Upon submission of a timely response to the notice of intent to order a mental or physical examination, the license holder or applicant shall have an opportunity to respond to or refute such an order by submission of evidence or written argument or both. The evidence and written argument supporting and opposing the mental or physical examination shall be reviewed by either a panel of the disciplining authority members who have not been involved with the allegations against the license holder or applicant or a neutral decision maker approved by the disciplining authority. The reviewing panel of the disciplining authority or the approved neutral decision maker may, in its discretion, ask for oral argument from the parties. The reviewing panel of the disciplining authority or the approved neutral decision maker shall prepare a written decision as to whether: There is reasonable cause to believe that the license holder or applicant may be unable to practice with reasonable skill and safety by reason of a mental or physical condition, or the manner or

form of the mental or physical examination is appropriate, or both.

(c) Upon receipt by the disciplining authority of the written decision, or upon the failure of the license holder or applicant to timely respond to the notice of intent, the disciplining authority may issue an order requiring the license holder or applicant to undergo a mental or physical examination. All such mental or physical examinations shall be narrowly tailored to address only the alleged mental or physical condition and the ability of the license holder or applicant to practice with reasonable skill and safety. An order of the disciplining authority requiring the license holder or applicant to undergo a mental or physical examination is not a final order for purposes of appeal. The cost of the examinations ordered by the disciplining authority shall be paid out of the health professions account. In addition to any examinations ordered by the disciplining authority, the licensee may submit physical or mental examination reports from licensed or certified health professionals of the license holder's or applicant's choosing and expense.

(d) If the disciplining authority finds that a license holder or applicant has failed to submit to a properly ordered mental or physical examination, then the disciplining authority may order appropriate action or discipline under RCW 18.130.180(9), unless the failure was due to circumstances beyond the person's control. However, no such action

or discipline may be imposed unless the license holder or applicant has had the notice and opportunity to challenge the disciplining authority's grounds for ordering the examination, to challenge the manner and form, to assert any other defenses, and to have such challenges or defenses considered by either a panel of the disciplining authority members who have not been involved with the allegations against the license holder or applicant or a neutral decision maker approved by the disciplining authority, as previously set forth in this section. Further, the action or discipline ordered by the disciplining authority shall not be more severe than a suspension of the license, certification, registration or application until such time as the license holder or applicant complies with the properly ordered mental or physical examination.

(e) Nothing in this section shall restrict the power of a disciplining authority to act in an emergency under RCW 34.05.422(4), 34.05.479, and 18.130.050(7).

(f) A determination by a court of competent jurisdiction that a license holder or applicant is mentally incompetent or mentally ill is presumptive evidence of the license holder's or applicant's inability to practice with reasonable skill and safety. An individual affected under this section shall at reasonable intervals be afforded an opportunity, at his or her expense, to demonstrate that the

individual can resume competent practice with reasonable skill and safety to the consumer.

(3) For the purpose of subsection (2) of this section, an applicant or license holder governed by this chapter, by making application, practicing, or filing a license renewal, is deemed to have given consent to submit to a mental, physical, or psychological examination when directed in writing by the disciplining authority and further to have waived all objections to the admissibility or use of the examining health professional's testimony or examination reports by the disciplining authority on the ground that the testimony or reports constitute privileged communications.

RCW 18.130.172

Evidence summary and stipulations.

(1) Prior to serving a statement of charges under RCW 18.130.090 or 18.130.170, the disciplinary authority may furnish a statement of allegations to the licensee or applicant along with a detailed summary of the evidence relied upon to establish the allegations and a proposed stipulation for informal resolution of the allegations. These documents shall be exempt from public disclosure until such time as the allegations are resolved either by stipulation or otherwise.

(2) The disciplinary authority and the applicant or licensee may stipulate that the allegations may be disposed of informally in accordance with this subsection. The stipulation shall contain a statement of the facts leading to the

filing of the complaint; the act or acts of unprofessional conduct alleged to have been committed or the alleged basis for determining that the applicant or licensee is unable to practice with reasonable skill and safety; a statement that the stipulation is not to be construed as a finding of either unprofessional conduct or inability to practice; an acknowledgement that a finding of unprofessional conduct or inability to practice, if proven, constitutes grounds for discipline under this chapter; and an agreement on the part of the licensee or applicant that the sanctions set forth in RCW 18.130.160, except RCW 18.130.160 (1), (2), (6), and (8), may be imposed as part of the stipulation, except that no fine may be imposed but the licensee or applicant may agree to reimburse the disciplinary authority the costs of investigation and processing the complaint up to an amount not exceeding one thousand dollars per allegation; and an agreement on the part of the disciplinary authority to forego further disciplinary proceedings concerning the allegations. A stipulation entered into pursuant to this subsection shall not be considered formal disciplinary action.

(3) If the licensee or applicant declines to agree to disposition of the charges by means of a stipulation pursuant to subsection (2) of this section, the disciplinary authority may proceed to formal disciplinary action pursuant to RCW 18.130.090 or 18.130.170.

(4) Upon execution of a stipulation under subsection (2) of this section by both the licensee or applicant and the disciplinary authority, the complaint is deemed disposed of and shall become subject to public disclosure on the same basis and to

the same extent as other records of the disciplinary authority. Should the licensee or applicant fail to pay any agreed reimbursement within thirty days of the date specified in the stipulation for payment, the disciplinary authority may seek collection of the amount agreed to be paid in the same manner as enforcement of a fine under RCW 18.130.165.

RCW 18.130.180

Unprofessional conduct.

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers or documents;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing reasonable and timely access for authorized representatives of the disciplining authority seeking to perform practice reviews at facilities utilized by the license holder;

(9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;

(10) Aiding or abetting an unlicensed person to practice when a license is required;

(11) Violations of rules established by any health agency;

(12) Practice beyond the scope of practice as defined by law or rule;

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

(14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;

(15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;

(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(18) The procuring, or aiding or abetting in procuring, a criminal abortion;

(19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;

(20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW;

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to

prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding;

(23) Current misuse of:

(a) Alcohol;

(b) Controlled substances; or

(c) Legend drugs;

(24) Abuse of a client or patient or sexual contact with a client or patient;

(25) Acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor of medical or health-related products or services intended for patients, in contemplation of a sale or for use in research publishable in professional journals, where a conflict of interest is presented, as defined by rules of the disciplining authority, in consultation with the department, based on recognized professional ethical standards.

RCW 18.130.185

Injunctive relief for violations of RCW 18.130.170 or 18.130.180.

If a person or business regulated by this chapter violates RCW 18.130.170 or 18.130.180, the attorney general, any prosecuting attorney, the secretary, the board, or any other person may maintain an action in the name of the state of

Washington to enjoin the person from committing the violations. The injunction shall not relieve the offender from criminal prosecution, but the remedy by injunction shall be in addition to the liability of the offender to criminal prosecution and disciplinary action.

RCW 18.130.190

Practice without license — Investigation of complaints — Cease and desist orders — Injunctions — Penalties.

(1) The secretary shall investigate complaints concerning practice by unlicensed persons of a profession or business for which a license is required by the chapters specified in RCW 18.130.040. In the investigation of the complaints, the secretary shall have the same authority as provided the secretary under RCW 18.130.050.

(2) The secretary may issue a notice of intention to issue a cease and desist order to any person whom the secretary has reason to believe is engaged in the unlicensed practice of a profession or business for which a license is required by the chapters specified in RCW 18.130.040. The person to whom such notice is issued may request an adjudicative proceeding to contest the charges. The request for hearing must be filed within twenty days after service of the notice of intention to issue a cease and desist order. The failure to request a hearing constitutes a default, whereupon the secretary may enter a permanent cease and desist order, which may

include a civil fine. All proceedings shall be conducted in accordance with chapter 34.05 RCW.

(3) If the secretary makes a final determination that a person has engaged or is engaging in unlicensed practice, the secretary may issue a cease and desist order. In addition, the secretary may impose a civil fine in an amount not exceeding one thousand dollars for each day upon which the person engaged in unlicensed practice of a business or profession for which a license is required by one or more of the chapters specified in RCW 18.130.040. The proceeds of such fines shall be deposited to the health professions account.

(4) If the secretary makes a written finding of fact that the public interest will be irreparably harmed by delay in issuing an order, the secretary may issue a temporary cease and desist order. The person receiving a temporary cease and desist order shall be provided an opportunity for a prompt hearing. The temporary cease and desist order shall remain in effect until further order of the secretary. The failure to request a prompt or regularly scheduled hearing constitutes a default, whereupon the secretary may enter a permanent cease and desist order, which may include a civil fine.

(5) Neither the issuance of a cease and desist order nor payment of a civil fine shall relieve the person so practicing or operating a business without a license from criminal prosecution therefor, but the remedy of a cease and desist order or civil fine shall be in addition to any criminal liability. The cease and desist order is conclusive proof of unlicensed practice and may be enforced under RCW 7.21.060. This

method of enforcement of the cease and desist order or civil fine may be used in addition to, or as an alternative to, any provisions for enforcement of agency orders set out in chapter 34.05 RCW.

(6) The attorney general, a county prosecuting attorney, the secretary, a board, or any person may in accordance with the laws of this state governing injunctions, maintain an action in the name of this state to enjoin any person practicing a profession or business for which a license is required by the chapters specified in RCW 18.130.040 without a license from engaging in such practice or operating such business until the required license is secured. However, the injunction shall not relieve the person so practicing or operating a business without a license from criminal prosecution therefor, but the remedy by injunction shall be in addition to any criminal liability.

(7) (a) Unlicensed practice of a profession or operating a business for which a license is required by the chapters specified in RCW 18.130.040, unless otherwise exempted by law, constitutes a gross misdemeanor for a single violation.

(b) Each subsequent violation, whether alleged in the same or in subsequent prosecutions, is a class C felony punishable according to chapter 9A.20 RCW.

(8) All fees, fines, forfeitures, and penalties collected or assessed by a court because of a violation of this section shall be remitted to the health professions account.

Chapter 34.05
Administrative Procedure Act
Adjudicative Proceedings

RCW 34.05.449
Procedure at hearing.

(1) The presiding officer shall regulate the course of the proceedings, in conformity with applicable rules and the prehearing order, if any.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

(3) In the discretion of the presiding officer, and where the rights of the parties will not be prejudiced thereby, all or part of the hearing may be conducted by telephone, television, or other electronic means. Each party in the hearing must have an opportunity to participate effectively in, to hear, and, if technically and economically feasible, to see the entire proceeding while it is taking place.

(4) The presiding officer shall cause the hearing to be recorded by a method chosen by the agency. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or

cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.

(5) The hearing is open to public observation, except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules. A presiding officer may order the exclusion of witnesses upon a showing of good cause. To the extent that the hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

RCW 34.05.452

Rules of evidence — Cross examination.

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the

Washington Rules of Evidence as guidelines for evidentiary rulings.

(3) All testimony of parties and witnesses shall be made under oath or affirmation.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

RCW 34.05.455

Ex parte communications.

(1) A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection:

(a) Where the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding;

(b) Any presiding officer may receive aid from legal counsel, or from staff assistants who are subject to the presiding officer's supervision; and

(c) Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.

(d) This subsection does not apply to communications required for the disposition of ex parte matters specifically authorized by statute.

(2) Unless required for the disposition of ex parte matters specifically authorized by statute or unless necessary to procedural aspects of maintaining an orderly process, a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.

(3) Unless necessary to procedural aspects of maintaining an orderly process, persons to whom a presiding officer may not communicate under subsections (1) and (2) of this section may not communicate with presiding officers without notice and opportunity for all parties to participate.

(4) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (5) of this section.

(5) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. Portions of the record pertaining to ex parte communications or rebuttal statements do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact at issue and that portion is admitted pursuant to RCW 34.05.452.

(6) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified, and the portions of the record pertaining to the communication may be sealed by protective order.

(7) The agency shall, and any party may, report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

RCW 34.05.458

Separation of functions.

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its preadjudicative stage, or one who is subject to the authority, direction, or discretion of such a person, may not serve as a presiding officer in the same proceeding.

(2) A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

(3) A person may serve as presiding officer at successive stages of the same adjudicative

proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425.

RCW 34.05.461

Entry of orders.

(1) Except as provided in subsection (2) of this section:

(a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;

(b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and

(c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues

of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

(8) (a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown.

(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).

(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

RCW 34.05.464

Review of initial orders.

(1) As authorized by law, an agency may by rule provide that initial orders in specified classes of cases may become final without further agency

action unless, within a specified period, (a) the agency head upon its own motion determines that the initial order should be reviewed, or (b) a party to the proceedings files a petition for administrative review of the initial order. Upon occurrence of either event, notice shall be given to all parties to the proceeding.

(2) As authorized by law, an agency head may appoint a person to review initial orders and to prepare and enter final agency orders.

(3) RCW 34.05.425 and 34.05.455 apply to any person reviewing an initial order on behalf of an agency as part of the decision process, and to persons communicating with them, to the same extent that it is applicable to presiding officers.

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

(5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.

(6) The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument.

(7) The reviewing officer shall enter a final order disposing of the proceeding or remand the matter for further proceedings, with instructions to the presiding officer who entered the initial order. Upon remanding a matter, the reviewing officer shall order such temporary relief as is authorized and appropriate.

(8) A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461(3).

(9) The reviewing officer shall cause copies of the final order or order remanding the matter for further proceedings to be served upon each party.

RCW 34.05.467

Stay.

A party may submit to the presiding or reviewing officer, as is appropriate to the stage of the proceeding, a petition for stay of effectiveness of a final order within ten days of its service unless otherwise provided by statute or stated in the final order. Disposition of the petition for stay shall be made by the presiding officer, reviewing officer, or agency head as provided by agency rule. Disposition may be made either before or after the effective date of the final order. Disposition denying a stay is not subject to judicial review.

RCW 34.05.470

Reconsideration.

(1) Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The place of filing and other procedures, if any, shall be specified by agency rule.

(2) No petition for reconsideration may stay the effectiveness of an order.

(3) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration. The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed, the agency does not either: (a) Dispose of the petition; or (b) serve the parties with a written notice specifying the date by which it will act on the petition.

(4) Unless the petition for reconsideration is deemed denied under subsection (3) of this section, the petition shall be disposed of by the same person or persons who entered the order, if reasonably available. The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further hearing.

(5) The filing of a petition for reconsideration is not a prerequisite for seeking judicial review. An

order denying reconsideration, or a notice provided for in subsection (3)(b) of this section is not subject to judicial review.

RCW 34.05.473

Effectiveness of orders.

(1) Unless a later date is stated in an order or a stay is granted, an order is effective when entered, but:

(a) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order;

(b) A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order;

(c) For purposes of determining time limits for further administrative procedure or for judicial review, the determinative date is the date of service of the order.

(2) Unless a later date is stated in the initial order or a stay is granted, the time when an initial order becomes a final order in accordance with RCW 34.05.461 is determined as follows:

(a) When the initial order is entered, if administrative review is unavailable; or

(b) When the agency head with such authority enters an order stating, after a

petition for administrative review has been filed, that review will not be exercised.

(3) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with RCW 34.05.479.

RCW 34.05.476

Agency record.

(1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.

(2) The agency record shall include:

(a) Notices of all proceedings;

(b) Any prehearing order;

(c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(d) Evidence received or considered;

(e) A statement of matters officially noticed;

(f) Proffers of proof and objections and rulings thereon;

(g) Proposed findings, requested orders, and exceptions;

(h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(i) Any final order, initial order, or order on reconsideration;

(j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and

(k) Matters placed on the record after an ex parte communication.

(3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.

RCW 34.05.479

Emergency adjudicative proceedings.

(1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.

Judicial Review

RCW 34.05.510

Relationship between this chapter and other judicial review authority.

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

RCW 34.05.514

Petition for review — Where filed.

(1) Except as provided in subsections (2) and (3) of this section, proceedings for review under this chapter shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.

(2) For proceedings involving institutions of higher education, the petition shall be filed either in the county in which the principal office of the institution involved is located or in the county of a branch campus if the action involves such branch.

(3) For proceedings conducted by the pollution control hearings board pursuant to chapter 43.21B RCW or as otherwise provided in RCW 90.03.210(2) involving decisions of the department of ecology on applications for changes or transfers of water rights that are the subject of a general adjudication of water rights that is being litigated actively under chapter 90.03 or 90.44 RCW, the petition must be filed with the superior court conducting the adjudication, to be consolidated by the court with the general adjudication. A party to the adjudication shall be a party to the appeal under this chapter only if the party files or is served with a petition for review to the extent required by this chapter.

RCW 34.05.526

Appellate review by supreme court or court of appeals.

An aggrieved party may secure appellate review of any final judgment of the superior court under this chapter by the supreme court or the court of appeals. The review shall be secured in the manner provided by law for review of superior court decisions in other civil cases.

RCW 34.05.530

Standing.

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning

of this section only when all three of the following conditions are present:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.542

Time for filing petition for review.

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is

extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

RCW 34.05.546

Petition for review — Contents

A petition for review must set forth:

(1) The name and mailing address of the petitioner;

(2) The name and mailing address of the petitioner's attorney, if any;

(3) The name and mailing address of the agency whose action is at issue;

(4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

(5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

(7) The petitioner's reasons for believing that relief should be granted; and

(8) A request for relief, specifying the type and extent of relief requested.

RCW 34.05.550

Stay and other temporary remedies.

(1) Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy.

(2) After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.

(3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:

(a) The applicant is likely to prevail when the court finally disposes of the matter;

(b) Without relief the applicant will suffer irreparable injury;

(c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

(4) If the court determines that relief should be granted from the agency's action granting a stay or other temporary remedies, the court may remand the matter or may enter an order denying a stay or granting a stay on appropriate terms.

RCW 34.05.554

Limitation on new issues.

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not

notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

RCW 34.05.558

Judicial review of facts confined to record.

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

. . . .

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court,

which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

. . . .

Chapter 246-10
Adjudicative Proceedings

WAC 246-10-101
Application of chapter.

(1) This chapter shall apply to adjudicative proceedings authorized to be conducted under the authority of the department of health.

(2) This chapter applies to adjudicative proceedings begun on or after the effective date of this chapter in programs administered by the department of health. For purposes of this section, "begun" shall mean the receipt by the appropriate office of an application for an adjudicative proceeding. These rules shall be the exclusive rules governing adjudicative proceedings under the jurisdiction of the department.

(3) To the extent that these rules differ by inclusion, deletion, or content from the model rules adopted by the chief administrative law judge pursuant to RCW 34.05.250, this chapter shall prevail in order to provide a process consistent with the organization of the department.

(4) Where a provision of this chapter conflicts with another chapter of this title, the provision of this chapter shall prevail.

(5) Where a provision of this chapter conflicts with a provision of the Revised Code of Washington, the statute shall prevail.

WAC 246-10-102

Definitions.

As used in these rules of practice and procedure, the following terms shall have the meaning set forth in this section unless the context clearly indicates otherwise. Other terms shall have their ordinary meaning unless defined elsewhere in this chapter.

"Adjudicative clerk office" shall mean the unit with responsibility for: Docketing; service of orders; and maintaining custody of the adjudicative proceeding record, whose address is:

Department of Health

Adjudicative Clerk Office

2413 Pacific Avenue

PO Box 47879

Olympia, WA 98504-7879

"Adjudicative proceeding" or "hearing" shall mean a proceeding required by statute or constitutional right and conducted under the rules of this chapter, which provides an opportunity to be heard by the department prior to the entry of a final order under this chapter.

"Brief adjudicative proceeding" shall mean an adjudicative proceeding or hearing, the scope or conduct of which is limited as provided in this chapter.

"Department" shall mean the Washington state department of health and, where appropriate,

the secretary of the Washington state department of health or the secretary's designee.

"Docket" or "docketing" shall mean the list or calendar of causes set to be heard at a specified time, prepared by the adjudicative clerk office for the use of the department.

"Filing" shall mean receipt by the adjudicative clerk office.

"Initiating document" shall mean a written agency document which initiates action against a license holder or applicant for license or recipient of benefits and which creates the right to an adjudicative proceeding. It may be entitled a statement of charges, notice of intent to deny, order, or by any other designation indicating the action or proposed action to be taken.

"License" shall have the meaning set forth in RCW 34.05.010, and includes any license, certification, registration, permit, approval, or any similar form of authorization required by law to be obtained from the department.

"Office of professional standards" shall mean the unit responsible for conducting adjudicative proceedings.

"Presiding officer" shall mean the person who is assigned to conduct an adjudicative proceeding. The presiding officer may be an employee of the department who is authorized to issue a final decision as designee of the secretary, or an administrative law judge employed by the office of administrative hearings.

"Presiding officer for brief adjudicative proceedings" shall mean an employee of the department who is authorized to conduct brief adjudicative proceedings.

"Program" shall mean the administrative unit within the department responsible for implementation of a particular statute or rule.

"Prompt adjudicative proceeding" or "prompt hearing" shall mean a hearing conducted at the request of the license holder or applicant for license following summary action taken in accord with this chapter against that license holder or applicant.

"Protective order" shall mean an order issued under this chapter which limits the use of, access to, or disclosure of information or evidence.

"Recipient of benefits" shall mean an individual who has qualified for benefits administered by the department.

"Respondent" shall mean a person eligible to request an adjudicative proceeding in a program under the jurisdiction of the department who is named in an initiating document.

"Secretary" shall mean the secretary of the department of health or his/her designee.

"Summary action" shall mean an agency action to address an immediate danger to the public health, safety, or welfare and shall include, but not be limited to, a cease and desist order, an order of summary suspension, and an order of summary restriction of a license.

WAC 246-10-104

Appearance of parties.

If a respondent requests an adjudicative proceeding to contest the action, that party shall appear at all stages of the proceeding except as otherwise provided in this section.

(1) If the respondent is represented as provided in this chapter, the respondent shall appear personally at the hearing and at any scheduled settlement conference but need not appear at the prehearing conference or at presentation of motions.

(2) Parties may be represented by counsel at all proceedings.

(3) The respondent may appear by telephone at any portion of the proceedings conducted by telephone, in the discretion of the presiding officer following reasonable advance notice to the presiding officer and to the opposing party.

(4) The requirement of personal appearance may be waived for good cause in the discretion of the presiding officer.

(5) Failure to appear as provided in this chapter shall be grounds for taking final action by default.

WAC 246-10-107

Persons who may request adjudicative proceedings.

. . . .

(2) With respect to all other matters involving the issuance, denial of, or adverse action against, a license, the applicant or licensee may request an adjudicative proceeding.

. . . .

WAC 246-10-108

Representation.

(1) Persons requesting an adjudicative proceeding may be represented subject to the following conditions:

(a) A person requesting an adjudicative proceeding may represent himself/herself or may be represented by an attorney who has complied with the admission to practice rules of the supreme court of the state of Washington;

. . . .

WAC 246-10-117

Official notice and agency expertise.

(1) Official notice may be taken as provided in RCW 34.05.452(5).

(2) The department, through its designated presiding officer, may use its expertise and specialized knowledge to evaluate and draw inferences from the evidence presented to it.

WAC 246-10-121

Notice to limited-English-speaking parties.

When the program or the adjudicative clerk office is notified or otherwise made aware that a limited-English-speaking person is a party in an adjudicative proceeding, all notices concerning the hearing, including notices of hearing, continuance, and dismissal, shall either be in the primary language of the party or shall include a notice in the primary language of the party which describes the significance of the notice and how the party may receive assistance in understanding and, if necessary, responding to the notice.

WAC 246-10-122

Interpreters.

(1) A "hearing impaired person" means a person who, because of a hearing impairment or speech defect, cannot readily understand or communicate in spoken language. A "hearing

impaired person" includes a person who is deaf, deaf and blind, or hard of hearing.

(2) A "limited-English-speaking person" means a person who because of a non-English-speaking cultural background cannot readily speak or understand the English language.

(3) If a hearing impaired person or a limited-English-speaking person is involved in an adjudicative proceeding and a need for an interpreter is made known to the adjudicative clerk office, the presiding officer shall appoint an interpreter who is acceptable to the parties or, if the parties are unable to agree on an interpreter, the presiding officer shall select and appoint an interpreter.

(4) Before beginning to interpret, an interpreter shall take an oath or make affirmation that:

(a) A true interpretation shall be made to the impaired person of all the proceedings in a language or in a manner the impaired person understands; and

(b) The interpreter shall repeat the statements of the impaired person to the presiding officer, in the English language, to the best of the interpreter's skill and judgment.

(5) When an interpreter is used in a proceeding:

(a) The interpreter shall translate all statements made by other participants in the proceeding;

(b) The presiding officer shall ensure sufficient extra time is provided to permit translation; and

(c) The presiding officer shall ensure that the interpreter translates the entire proceeding to the hearing impaired person or limited-English-speaking person to the extent that the person has the same opportunity to understand the statements made as would a person not requiring an interpreter.

(6) An interpreter appointed under this section shall be entitled to a reasonable fee for services, including waiting time and reimbursement for actual necessary travel expenses. The program shall pay the interpreter fee and expenses incurred for interpreters for license holders, applicants, or recipients of benefits. The party on whose behalf a witness requiring an interpreter appears shall pay for interpreter services for that witness.

(7) All proceedings shall be conducted consistent with chapters 2.42 and 2.43 RCW.

WAC 246-10-123

Subpoenas.

(1) The presiding officer, the secretary or designee, and attorneys for parties may issue subpoenas to residents of the state of Washington, to license holders and applicants for license, and to other persons or entities subject to jurisdiction under RCW 4.28.185.

(2) The presiding officer shall issue subpoenas pursuant to RCW 34.05.446(1) for parties not represented by counsel upon request of the party and upon a showing of relevance and reasonable scope of the testimony or evidence sought. Requests for issuance of subpoenas must be made in writing to the presiding officer stating the relevance and the scope of testimony or evidence sought.

(3) The person on whose behalf the subpoena is issued shall pay any witness fees and expenses as provided in WAC 246-10-115 or costs for interpreters for such witnesses as provided in WAC 246-10-122.

(4) Attendance of persons subpoenaed and production of evidence may be required at any designated place in the state of Washington.

(5) Every subpoena shall:

(a) Comply with WAC 246-10-120;

(b) Identify the party causing issuance of the subpoena;

(c) State the title of the proceeding; and

(d) Command the person to whom the subpoena is directed to attend and give testimony and/or produce designated items under the person's control at a specified time and place.

(6) A subpoena may be served by any suitable person eighteen years of age or older by:

(a) Giving a copy to the person to whom the subpoena is addressed;

(b) Leaving a copy at the residence of the person to whom the subpoena is addressed with a person of suitable age and discretion;

(c) Sending a copy by mail to the current address on file with the department if the person is licensed by the department or has filed an application for a license with the department; or

(d) Sending a copy by certified mail with proof of receipt if the person is neither licensed by nor has applied for a license with the department.

(7) Proof of service may be made by:

(a) Affidavit of personal service;

(b) Certification by the person mailing the subpoena to a license holder or applicant; or

(c) Return or acknowledgment showing receipt by the person subpoenaed or his/her representative. Any person accepting certified or registered mail at the last known address of the person subpoenaed shall be considered an authorized representative.

(8) The presiding officer, upon motion made promptly and before the time specified for compliance in the subpoena, may:

(a) Quash or modify the subpoena if the subpoena is unreasonable or requires evidence not relevant to any matter at issue; or

(b) Condition denial of the motion upon just and reasonable conditions, including

advancement of the reasonable cost by the person on whose behalf the subpoena is issued of producing the books, documents, or tangible things; or

(c) Issue a protective order under RCW 34.05.446.

(9) The department may seek enforcement of a subpoena under RCW 34.05.588(1) or proceed in default pursuant to WAC 246-10-204.

WAC 246-10-201

Form and content of initiating documents.

(1) Initiating documents shall include a clear and concise statement of the:

(a) Identity and authority of the person issuing the document;

(b) Factual basis for the action or proposed action set forth in the document;

(c) Statutes and rules alleged to be at issue;

(d) Identity of the party against whom the action is taken or proposed to be taken;

(e) Action or proposed action or penalties, including the statutory or rule authority for those actions or penalties;

(f) Signature of the person issuing the document and the date signed; and

(g) Method by which an adjudicative proceeding may be requested.

(2) Initiating documents shall be accompanied by the following documents:

(a) Notice that the respondent may defend against the action or proposed action; and

(b) Form for requesting adjudicative proceeding.

(3) Initiating documents shall be served as described in WAC 246-10-109.

WAC 246-10-202

Amendment of initiating documents.

(1) Prior to the hearing date, initiating documents may be amended subject to the following conditions:

(a) Amended initiating documents shall meet the requirements of WAC 246-10-201(1);

(b) Amended initiating documents shall be accompanied by the documents described in WAC 246-10-201(2);

(c) Whenever amended initiating documents are issued, a new interval for response will begin, as described in WAC 246-10-203, unless the respondent requests the time periods set by the original initiating document; and

(d) Issuance of amended initiating documents ends all obligations of the parties under the prior initiating documents.

(2) On the hearing date, the initiating documents may be amended subject to the following conditions:

(a) The documents may be amended upon motion of the state;

(b) The documents may not be amended without the approval of the presiding officer; and

(c) Upon motion of a party or upon his/her own initiative, the presiding officer may grant a continuance on all or part of the matter if necessary to afford the respondent an opportunity to prepare a defense to the amended documents.

WAC 246-10-203

Request for adjudicative proceeding.

A respondent may respond to an initiating document by filing an application for an adjudicative proceeding or by waiving the opportunity for adjudicative proceeding.

(1) If the respondent wishes to file an application for an adjudicative proceeding:

(a) An application for adjudicative proceeding must be filed in accordance with the following time periods:

(i) For matters under chapter 18.130 RCW, the Uniform Disciplinary Act, within twenty days of service of the initiating documents unless an

extension has been granted as provided in subsection (3) of this section; and

(ii) For all other matters in which the program proposes to deny, suspend, revoke or modify a license or proposes to impose a civil fine, within twenty-eight days of receipt of the initiating documents, unless otherwise provided by statute; and

(iii) For all other matters, within twenty days of service of the initiating documents, unless otherwise provided by statute.

(b) The application for adjudicative proceeding shall be made either on the Request for Adjudicative Proceeding Form accompanying the initiating documents or by a written document containing at least the following information:

(i) Name and address of the party requesting an adjudicative proceeding;

(ii) Name and address of the attorney representing the party, if any;

(iii) Identification of the portion or portions of the initiating documents contested;

(iv) Summary of the party's position on the portion or portions contested;

(v) Statement of the party's standing to request an adjudicative proceeding under WAC 246-10-107; and

(vi) For matters not under chapter 18.130 RCW and in which the department proposes to deny, suspend, revoke or modify a license or proposes to impose a civil fine, the application shall include a copy of the initiating document containing the adverse notice.

(c) By filing a request for adjudicative proceeding, the responding party agrees to appear personally at the adjudicative proceeding or, if otherwise approved by the presiding officer, by telephone, unless appearance is waived as authorized in WAC 246-10-104(4).

(d) The application for adjudicative proceeding shall contain a response to the initiating documents, indicating whether each charge is admitted, denied, or not contested, and responses shall be subject to the following conditions:

(i) Once admitted or not contested, an allegation may not be denied; and

(ii) An allegation denied or not contested may later be admitted.

(e) When an allegation is admitted or not contested, it shall be conclusively deemed to be true for all further proceedings. No proof of the allegation need be submitted.

(f) The application for adjudicative proceeding shall specify the representative, if any, designated pursuant to WAC 246-10-108 and any request for interpreter. The responding party shall amend the name of the representative and need for interpreter immediately if circumstances change prior to the hearing.

(g) The application for adjudicative proceeding shall be filed at the adjudicative clerk office at the address specified in WAC 246-10-102.

(2) A respondent may waive an adjudicative proceeding and submit a written statement and other documents in defense or in mitigation of the charges. Such waiver and documents shall be filed:

(a) In accordance with the timelines in subsection (1)(a) of this section; and

(b) At the address indicated in subsection (1)(g) of this section.

(3) For matters under RCW 18.130.180, if the twenty-day limit for filing an application for adjudicative proceeding results in a hardship to the respondent, the respondent may request an extension of not more than sixty days upon a showing of good cause.

(a) The request for extension shall be filed within the twenty day limit and shall include:

(i) The reason for the request and the number of days for which the extension is requested; and

(ii) Documentation of the circumstances creating the hardship.

(b) The request shall be granted for a period not to exceed sixty days upon showing of:

(i) Illness of the respondent; or

(ii) Absence of the respondent from the county of residence or employment; or

(iii) Emergency in the respondent's family; or

(iv) Other good cause as determined by the presiding officer.

(c) If a request for extension is denied, the respondent shall have ten days from service of the order denying the extension or twenty days from service of the initiating documents, whichever is longer, to file an application for adjudicative proceeding.

WAC 246-10-402

Discovery.

The parties are encouraged to exchange information and documents related to the case prior to the adjudicative proceeding. Formal discovery is obtained as follows:

(1) Methods, scope and limits:

(a) Parties may obtain discovery by production of records or things; deposition

upon oral examination; requests for admission; or, if ordered by the presiding officer, written interrogatories.

(b) Unless otherwise limited by order of the presiding officer in accord with these rules, the scope of discovery shall be as follows:

(i) Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter in the pending action. It is not grounds for objection that the information sought will be inadmissible at the adjudicative proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(ii) The frequency or extent of use of the discovery methods set forth in these rules shall be limited by the presiding officer if the presiding officer determines that:

(A) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive; or

(B) The party seeking discovery has had an ample opportunity by discovery to obtain the information sought; or

(C) The discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations of the parties' resources, and the importance of the issues at stake.

(iii) The presiding officer may limit discovery upon his or her own initiative after reasonable notice or pursuant to a motion submitted by a party.

(2) Production of records, documents or things:

(a) Upon written request of a party the opposing party shall identify experts and other witnesses to be called at a hearing and shall provide other information necessary to enable the party to conduct depositions of the witnesses.

(b) Any party may serve on any other party a request, which must be signed by the party or designated representative:

(i) To produce and permit the party making the request or designee to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of discovery and which are in the possession, custody or control of the party upon whom the request is served; or

(ii) To permit entry onto designated land or other property which is in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or designated object or operation thereon which is within the scope of discovery.

(c) Any party who produces documents for inspection shall produce them as they are kept in the usual course of business or may, if the parties agree, organize and label them to correspond with the categories in the request.

(d) The party upon whom a request is made may, by motion to the presiding officer, move for an order denying the request to produce or modifying the conditions of the request. Denial of the request or change in the conditions of the request shall be within the discretion of the presiding officer and shall be made by written order.

(3) Depositions may be taken subject to the following conditions:

(a) Within the United States or a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the state of Washington or of the place where the examination is held. A presiding officer may, in his or her discretion or following motion of a party, preside at the deposition. Within a foreign

country, depositions shall be taken before a secretary of an embassy or legation, consul general, vice-consul or consular agent of the United States, or a person designated by the presiding officer or agreed upon by the parties by stipulation in writing filed with the office of professional standards. Except by stipulation, no deposition shall be taken before any person who is a party or a privy of a party, or a privy of any representative of a party, or who is financially interested in the proceeding.

(b) A party desiring to take the deposition of a person upon oral examination shall give reasonable notice of not less than five days in writing to the person to be deposed and to the opposing party. The notice shall state the time and place for taking the deposition, the name and address of each person to be examined, if known, and if the name is not known, a description sufficient to identify the person to be examined or the particular class or group to which the person to be examined belongs. On motion of a party upon whom the notice is served, the presiding officer may for cause shown, lengthen or shorten the time.

(c) After notice is served for taking a deposition, or upon motion of the presiding officer or upon motion reasonably made by any party or by the person to be examined, and upon notice and for good cause, the presiding officer may issue an order that the deposition shall not be taken or that it be taken

subject to specified restrictions, conditions, or limitations.

(d) Depositions shall be recorded.

(i) The officer before whom the deposition is taken shall put the witness on oath or affirmation and shall personally or by someone acting under the officer's direction and in the officer's presence, record the testimony.

(ii) The officer or person acting under the officer's direction shall transcribe the testimony at the request of any party, provided that any expenses shall be paid by the requesting party.

(iii) The transcribed testimony shall be submitted to the person deposed for review and signature, unless review and signature are waived by that person. The officer shall append to the transcript any changes in form or substance that may be submitted by the parties.

(iv) Copies of the transcribed and, unless review and signature has been waived, signed testimony shall be served upon the person deposed and upon the parties.

(e) If the parties so stipulate in writing or on the record, depositions may be taken before any person, at any time or place, upon

any notice, and in any manner and when so taken, may be used as any other deposition.

(4) Following motion of a party and opportunity for response by the opposing party, the presiding officer may order a party to respond to written interrogatories and may order that the interrogatories be subject to specified restriction, condition, or limitation.

WAC 246-10-403

Motions.

(1) The presiding officer shall rule on motions. The presiding officer may rule on motions without oral argument or may request or permit the parties to argue the motion in person or by telephone. Oral argument may be limited in time at the discretion of the presiding officer.

(2) All prehearing motions, including discovery and evidentiary motions, shall be made in writing and filed with the adjudicative clerk office prior to the dates set in the scheduling order.

(3) Motions for continuance must be made in writing and filed prior to the dates set in the scheduling order. If the adjudicative proceeding is scheduled to take place fewer than twenty days from service of the scheduling order, motions for continuance must be made within ten days of service of the scheduling order, but in no event fewer than five days prior to the hearing. Continuances may be granted by the presiding officer for good cause.

(4) The presiding officer may grant a continuance when a motion for continuance is not submitted within the time limits contained in subsection (3) of this section for good cause.

(5) The following is the recommended format for motions:

(a) A succinct statement of the facts contended to be material;

(b) A concise statement of the issue, issues or law upon which the presiding officer is requested to rule;

(c) The specific relief requested by the moving party;

(d) If the motion requires the consideration of facts or evidence not appearing on the record, the moving party shall also serve and file copies of all affidavits and photographic or documentary evidence presented in support of the motion;

(e) The legal authority upon which the motion is based; and

(f) A proposed order may accompany the motion, and should contain findings of fact and conclusions of law.

(6) The moving party shall file the motion, and the accompanying affidavits and photographic or documentary evidence when necessary, with the adjudicative clerk office and shall serve the motion, and the accompanying affidavits and photographic or documentary evidence when necessary, on all other parties.

(7) The opposing party shall file with the adjudicative clerk office, and serve upon the moving party, a responsive memorandum, and accompanying affidavits and photographic or documentary evidence when necessary, no later than eleven days following service of the motion, unless otherwise ordered by the presiding officer.

(8) The moving party may file with the adjudicative clerk office, and serve upon the opposing party, a reply memorandum no later than five days following service of the responsive memorandum, unless otherwise ordered by the presiding officer.

(9) Unless otherwise ordered by the presiding officer, all motions shall be decided without oral argument. A party requesting oral argument on a motion shall so indicate by typing "ORAL ARGUMENT REQUESTED" in the caption of the motion or the responsive memorandum. If a request for oral argument is granted, the presiding officer shall notify the parties of the date and time of the argument and whether the argument will be in person or by telephone conference.

(10) Motions to shorten time or emergency motions shall be exceptions to the rule, and a party may only make such motions in exigent or exceptional circumstances. When making such a motion, the moving party shall:

(a) Suggest a date and time when the moving party seeks to have the presiding officer hear the motion to shorten time, which should be at least forty-eight hours after filing;

(b) Suggest a date and time when the moving party seeks to have the presiding officer consider the merits of the underlying motion;

(c) Describe the exigent or exceptional circumstances justifying shortening of time in an affidavit or a memorandum accompanying the motion;

(d) Certify that the motion to shorten time and the underlying motion have been served on all other parties prior to the filing of the motion with the presiding officer. Any opposition to the motion to shorten time must be served and filed within twenty-four hours of the service of the motion. If the presiding officer grants the motion to shorten time, the presiding officer shall notify the parties of the date by which the responsive memorandum to the underlying motion shall be served and filed.

(11) All motions will be decided as soon as practical, but not more than thirty days following the filing of the motion. If the presiding officer will not decide the motion within this time, the presiding officer shall notify the parties in writing of the date by which the motion will be decided.

(12) If a party serves a motion or responsive memorandum by mail, pursuant to WAC 246-10-109, then three days shall be added to the time within which the opposing party must file and serve the responsive or reply memorandum.

(13) All computations of time shall be calculated pursuant to WAC 246-10-105.

(14) Departmental motions for summary actions are exempted from all requirements of this rule.

WAC 246-10-405

Protective orders.

The presiding officer may issue a protective order at his or her discretion:

(1) To protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense;

(2) To preserve confidentiality related to health care records or provider-client information;

(3) To protect examination processes;

(4) To protect the identity of a person supplying information to the department where the person indicates a desire for nondisclosure unless that person testifies or has been called to testify at an adjudicative proceeding; or

(5) To comply with applicable state or federal law.

WAC 246-10-602

Conduct of adjudicative proceeding.

(1) The adjudicative proceeding shall be conducted as provided in RCW 34.05.449 through 34.05.455.

(2) The presiding officer may take the following actions to the extent not already determined in a prehearing order:

(a) Conduct the hearing de novo;

(b) Determine the order of presentation of evidence;

(c) Administer oaths and affirmations;

(d) Issue subpoenas;

(e) Rule on procedural matters, objections, motions, and offers of proof;

(f) Receive relevant evidence;

(g) Interrogate witnesses called by the parties in an impartial manner to develop any facts necessary to fairly and adequately decide the matter;

(h) Call additional witnesses and request additional exhibits deemed necessary to complete the record and receive such evidence subject to full opportunity for cross-examination and rebuttal by all parties;

(i) Take any appropriate action necessary to maintain order during the adjudicative proceeding;

(j) Determine whether to permit or require oral argument or briefs and determine the time limits for submission thereof;

(k) Permit photographic and recording equipment at hearing subject to conditions necessary to preserve confidentiality and prevent disruption;

(l) Permit a person to waive any right conferred upon that person by chapter 34.05 RCW or this chapter, except as precluded by law; and

(m) Take any other action necessary and authorized by applicable law or rule.

(3) The presiding officer shall:

(a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;

(b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes, rules, and court decisions; and

(c) Not declare any statute or rule invalid.

(4) If the validity of any statute or rule is raised as an issue, the presiding officer may permit arguments to be made on the record concerning the issue for the purpose of subsequent review.

(5) A party may move to disqualify the presiding officer pursuant to RCW 34.05.425(3).

WAC 246-10-603

Evidence.

(1) The presiding officer shall rule on objections to the admissibility of evidence pursuant

to RCW 34.05.452 unless those objections have been addressed in the prehearing order.

(2) The refusal of a witness to answer any question ruled proper shall be grounds for the presiding officer, at his/her discretion, to strike some or all prior testimony by that witness on related matters or to grant a continuance to allow a party to seek a court order to compel the witness to answer.

(3) Each person called as a witness in an adjudicative proceeding shall swear or affirm that the evidence about to be given in the adjudicative proceeding shall be the truth under the provisions of RCW 5.28.020 through 5.28.060.

WAC 246-10-605

Issuance of final order.

If the adjudicative proceeding is conducted by a presiding officer authorized to make the final decision, the presiding officer shall:

(1) Issue a final order containing findings of fact and conclusions of law and an order; and

(2) Cause the adjudicative clerk office to serve a copy of the order on each party and any designated representative of the party.

WAC 246-10-606

Standard of proof.

The order shall be based on the kind of evidence upon which reasonably prudent persons are

accustomed to rely in the conduct of their affairs. In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria. In all other cases the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence.

WAC 246-10-701

Appeal from initial order.

(1) Any party may file a written petition for administrative review of an initial order issued under WAC 246-10-503 or 246-10-608 stating the specific grounds upon which exception is taken and the relief requested.

(2) Petitions for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within twenty-one days of service of the initial order.

(3) The opposing party may file a response to a petition for administrative review filed as provided in this section. The response shall be filed at the adjudicative clerk office. The party filing the response shall serve a copy of the response upon the party requesting administrative review. If the initial order was entered pursuant to WAC 246-10-503, the response shall be filed within ten days of service of the petition. In all other matters, the response shall be filed within twenty days of service of the petition.

WAC 246-10-702

Final orders.

(1) The form and content of final orders shall be as follows:

(a) Final orders shall contain findings of fact, conclusions of law, and an order, and shall be signed by the presiding officer.

(b) Final orders may adopt by reference the initial order in whole or in part.

(c) Final orders may modify or revise the initial order in whole or in part.

(2) Final orders shall be served upon the parties and their representatives as provided in WAC 246-10-109.

(3) Final orders shall be issued following:

(a) A review of the record;

(b) A review of the initial order, if any;

(c) A review of any request for administrative review of the initial order and any response thereto; and

(d) Consideration of protection of the public health and welfare.

(4) Unless a later date is stated in the final order, final orders shall be effective when entered but a party shall not be required to comply with a final order until the order is served upon that party.

(5) Final orders may contain orders that specified portions of the agency record shall not be disclosed as public records if necessary to protect

privacy interests, the public welfare, or vital governmental functions. Such orders shall include but are not limited to protective orders issued during the proceeding or pursuant to WAC 246-10-405.

WAC 246-10-704

Reconsideration of final orders.

(1) Within ten days of service of a final order, either party may file a petition for reconsideration, stating the specific grounds upon which reconsideration is requested and the relief requested.

(2) Grounds for reconsideration shall be limited to:

(a) Specific errors of fact or law; or

(b) Implementation of the final order would require department activities inconsistent with current department practice; or

(c) Specific circumstances render the person requesting reconsideration unable to comply with the terms of the order.

(3) Petitions for reconsideration must be served upon the opposing party and filed with the adjudicative clerk office within ten days of service of the final order.

(4) If reconsideration is requested based on an error of fact, the request for reconsideration shall contain specific reference to the record. If reconsideration is requested based on testimony of record, the request for reconsideration shall contain specific reference to the testimony. The presiding

officer may require that the party requesting reconsideration submit a copy of the transcript of the adjudicative proceeding and provide specific reference to the transcript.

(5) The petition for reconsideration is denied if, within twenty days of the date the petition is filed, the presiding officer:

(a) Denies the petition;

(b) Does not act upon the petition; or

(c) Does not serve the parties with notice of the date by which he/she will act on the petition.

(6) If the presiding officer determines to act upon the petition, the opposing party shall be provided at least ten days in which to file a response to the petition.

(7) Disposition of petitions for reconsideration shall be in the form of a written order denying the petition, granting the petition, and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings.

WAC 246-10-706

Judicial review.

(1) Judicial review of actions taken under this chapter shall be as provided in RCW 34.05.510, et seq.

(2) Notice of the opportunity for judicial review shall be provided in all final orders.

(3) Following a petition for judicial review, the record forwarded to the reviewing court shall be those portions of the agency record designated by the parties within the time period set by the secretary.

Chapter 246-841
Nursing Assistants

WAC 246-841-990
Nursing assistant — Fees and renewal cycle.

(1) Certificates and registrations must be renewed every year on the practitioner's birthday as provided in chapter 246-12 WAC, Part 2. The secretary may require payment of renewal fees less than those established in this section if the current level of fees is likely to result in a surplus of funds. Surplus funds are those in excess of the amount necessary to pay for the costs of administering the program and to maintain a reasonable reserve. Notice of any adjustment in the required payment will be provided to practitioners. The adjustment in the required payment shall remain in place for the duration of a renewal cycle to assure practitioners an equal benefit from the adjustment.

(2) The following nonrefundable fees will be charged for registrations:

Title of Fee	Fee
Application - registration	$ 15.00
Renewal of registration	25.00
Duplicate registration	10.00
Registration late penalty	25.00
Expired registration reissuance	25.00

(3) The following nonrefundable fees will be charged for certifications:

Title of Fee	Fee
Application for certification	15.00
Certification renewal	25.00
Duplicate certification	10.00
Certification late penalty	25.00
Expired registration reissuance	25.00